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87-470

No. _____

In The

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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APPENDIX A

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
STEPHEN GOLDSMITH,	)	
	)	No. 4-1283 A 415
Appellee.	)	in the Court of
	)	Appeals
FORT WAYNE BOOKS, INC., et al.,	)	
	)	No. 29S04-8703-
	)	CV-270 in the
Appellants,	)	Indiana Supreme
	)	Court
v.	)	
	)	
STATE OF INDIANA AND STEPHEN M. SIMS,	)	
	)	
	)	
Appellees.	)	

INTERLOCUTORY APPEAL FROM HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. C83-346

and

INTERLOCUTORY APPEAL FROM ALLEN CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge
Cause No. CC-84-446

CIVIL PETITION TO TRANSFER

GIVAN, C.J.

These consolidated causes are before the Court on appellees' Petition to Transfer. Appellees filed similar

actions in which they allege the various defendants, owners and operators of adult bookstores, have engaged in racketeering activity as defined in the Racketeer Influenced and Corrupt Organizations Act (RICO), Ind. Code § 35-45-6-1 *et seq.* Appellees seek various remedies as provided in the Civil Remedies for Racketeering Activity (CRRA) statute, Ind. Code § 34-4-30.5-1 *et seq.*

In both cases the trial court, pursuant to Ind. Code § 34-4-30.5-3(b), entered an *ex parte* order seizing appellants' assets. On interlocutory appeal of the denial of appellants' motions to vacate the seizure orders, a majority of the Court of Appeals, Fourth District, held that the RICO and CRRA statutes constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity. *4447 Corp. v. Goldsmith* (1985), Ind. App., 479 N.E.2d 578, 592. We grant appellees' petition and thereby vacate the opinion of the Court of Appeals.

In 1980, the legislature enacted the Indiana RICO statute, which is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83. As set out in Ind. Code § 35-45-6-2 (a), a person:

> "(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;"

commits the offense of Corrupt Business Influence, a Class C felony. "'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of a number of enumerated predicate offenses, including violation of the obscenity statute. Ind. Code § 35-45-6-1. A "pattern of racketeering activity" is defined as "engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission...." *Id.*

Under the CRRA provisions, the prosecuting attorney in a county in which the violation occurs may bring an action to enjoin a violation of the RICO statute. Ind. Code § 34-4-30.5-2. If the court finds by a preponderance of the evidence that such a violation has occurred, it may:

> "(1) order a defendant to divest himself of any interest in any enterprise or real property;
>
> (2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;
>
> (3) order the dissolution or reorganization of any enterprise;
>
> (4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;
>
> (5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revo-

cation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate." *Id.*

Additionally, pursuant to Ind. Code § 34-4-30.5-3(a), the prosecuting attorney in a county in which any of the property is located "may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2." Upon a showing by a preponderance of the evidence that the property in question was so used, the court shall order the property forfeited to the state. *Id.* When a forfeiture action has been filed, the prosecutor may move for an order to have the property subject to forfeiture seized by a law enforcement agency and the court "shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred." Ind. Code § 34-4-30.5-3(b).

The first of the instant cases was commenced on August 1, 1983, when appellee Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit, filed a CRRA action in Marion Circuit Court. The complaint alleged that the three bookstores owned and operated by the individual and corporate defendants (appellants) comprised an illegal

enterprise as defined in Ind. Code § 35-45-6-1 and that appellants had engaged in a pattern of racketeering activity. The predicate offenses alleged were the distribution of obscene matter in violation of Ind. Code § 35-30-10.1-2 (repealed by Acts 1983, P.L. 311, recodified as Ind. Code § 35-49-3-1).

At the same time Goldsmith filed a Verified Petition for Seizure of Property Subject to Forfeiture. In support of the petition, he attached a probable cause affidavit sworn by Detective Thomas R. Rogers of the Indianapolis Police Department. Detective Rogers stated therein that he and other officers had visited the two operating bookstores alleged to be part of the illegal enterprise, where they observed sexually-oriented books, magazines, films and videotapes available for sale or exhibition. The officers purchased four sexually explicit movies which were submitted to the court.

The officers were informed by one of the bookstore employees that a new bookstore, to be known as the Plaza Entertainment Center, was due to open at 4266 West 38th Street in Indianapolis on August 1, 1983. One of the officers visited that location and spoke to a construction worker, who informed the officer that sexually-oriented materials would be available for sale. In conclusion, Detective Rogers alleged that numerous investigations had led him to the reasonable belief that the two existing adult bookstores were part of a single enterprise and that the enterprise was preparing to open a new bookstore which would sell and exhibit obscene materials.

Based on those representations, the trial court on August 1 found probable cause to believe violations of the RICO statute existed and entered an *ex parte* order com-

pelling the Indianapolis Police Department to seal the unopened bookstore. The court also ordered appellants to preserve certain business equipment located at the two operating bookstores and to list their other property. Trial was set for 72 hours later.

On August 4 appellants filed motions to dismiss the complaint and to vacate the seizure order, based in part on their contention that the order and the RICO statute abridged the exercise of the freedoms of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution. The cause was continued on appellants' motions and later transferred to Hamilton Circuit Court, where on September 8 Goldsmith filed an amended complaint seeking a number of CRRA remedies.

On December 21, 1983, the trial court denied appellants' motions to dismiss the complaint and to vacate the August 1 seizure order. The court, pursuant to Ind.R. App.P. 4(B)(6), then certified for interlocutory appeal the question of whether a seizure order may issue when based on obscenity violations not yet litigated.

On March 19, 1984, appellee Stephen Sims, Prosecuting Attorney for the Thirty-Eighth Judicial District, filed a CRRA action in the Allen Circuit Court. The complaint alleged that the three adult bookstores owned and operated by the various defendants (appellants) comprised an illegal enterprise and that appellants had engaged in a pattern of racketeering activity, the predicate offenses being the distribution of obscene materials. Cited in the complaint were appellants' thirty-nine obscenity convictions entered between June of 1981 and March of 1984.

Sims simultaneously filed a Verified Petition for Seizure of Property Subject to Forfeiture. Attached to the

petition was a probable cause affidavit sworn by Officer Charles Dennis of the Ft. Wayne Police Department. The affidavit alleged the thirty-nine prior obscenity convictions and related that police officers had observed materials believed to be obscene during recent surveillance of the bookstores. Also submitted to the court were taped descriptions by police officers of the contents of the materials.

That same day the court entered an *ex parte* order allowing the Ft. Wayne Police Department to seize the contents of the three bookstores. On March 23 appellants moved to vacate the order and in the alternative sought a modification of the order which would allow them to continue the sale and distribution of the materials in the bookstores. Those motions were premised on appellants' allegation that the order constituted a constitutionally impermissible prior restraint. The motions were denied on March 29.

After police officers on April 3 hauled away the contents of the bookstores, appellants filed an Emergency Motion for Inventory of Property Removed and/or Return of Property. That motion was also denied. On April 18 the trial court certified two questions for interlocutory appeal: 1) whether an application for seizure upon probable cause shown *ex parte* as provided by Ind. Code § 34-4-30.5-3(b) violates due process guarantees provided by the Indiana and United States Constitutions; and 2) whether the seizure order, which is based upon prior criminal convictions, is a violation of the First Amendment.

Thus these cases are similar, with several important factual distinctions. In the Marion County case, the predicate obscenity violations were shown by the allegations of

the investigating officers, while in the Ft. Wayne case the predicate violations underlying the RICO allegation were shown by proof of prior convictions for violations of the Indiana obscenity statute. The two existing Marion County bookstores were permitted to continue operating pending trial and the unopened store was sealed. The Court of Appeals issued a stay order allowing the store to open. The three bookstores in Ft. Wayne were sealed and the contents were hauled away by the police. Those stores remain closed.

Upon consolidating the two cases, the Court of Appeals determined that its disposition of the interlocutory appeals "require[d] resolution of but a single issue: whether the RICO and CRRA provisions invoked against the defendants abridge the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution." *4447 Corp., supra* at 583. The court concluded that:

> "[T]he challenged RICO/CRRA provisions are unconstitutional on three distinct yet interrelated grounds. First, they operate as a prior restraint which impermissibly impinges upon the dissemination of protected materials. Second, these measures fail to comply with the procedural safeguards required even for the suppression of *obscene* materials. Finally, independent of our determination that these statutes operate as an unconstitutional prior restraint, their provisions as they relate to obscenity must fall under the less restrictive means test announced in *United States v. O'Brien* (1968), 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, for the evaluation of allegedly content-neutral state regulation which has an incidental impact upon free expression." *Id.* at 585 (original emphasis).

Before addressing the questions certified for interlocutory appeal, we must analyze the issue found by the

Court of Appeals to be dispositive, namely whether the RICO/CRRA tatutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E.2d 585.

Appellees argue the purpose of the CRRA remedies is not to suppress speech but rather to compel the forfeiture of assets acquired through racketeering activity; therefore, their actions were not undertaken in an effort to enjoin or restrain any future display or distribution of presumptively protected expressive material. Appellees assert that since any personal property, regardless of its nature, which is derived from racketeering activity could possibly be seized, the seizure orders were not entered because appellants' assets were obscene materials but because there was probable cause to believe they were assets subject to forfeiture.

Appellants contend that the statutory scheme must be analyzed in terms of its effect upon the exercise of First Amendment rights, and in so doing the only conclusion that can be reached is that the statutes as applied to the predicate offense of obscenity constitute an impermissible prior restraint. Appellants would have us adopt the Court of Appeals' view "that for constitutional purposes, these proceedings must be viewed as the functional equivalent of a nuisance or obscenity action," *4447 Corp., supra* at 597, and cite a number of cases involving state actions

found to constitute prior restraints. *See, e.g., Entertainment Concepts, Inc., III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497 (license revocation); *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1978), 587 F.2d 159 (nuisance abatement), *aff'd.* (1980), 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413; *State ex rel. Blee v. Mohney Enterprises* (1972), 154 Ind.App. 244, 289 N.E.2d 519 (injunction).

To appellants, the word "racketeering" as applied in this context is merely a semantic device to allow the state to "expand its arsenal of weapons designed to suppress obscenity" to include license revocation, padlocking, forfeiture of property used to disseminate obscene matter and similar methods which the courts have historically condemned; consequently, the CRRA remedies constitute a restraint on future expression. We cannot agree.

The purpose of the federal RICO statute, after which the Indiana statute was patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17, 26. Its provisions are to be liberally construed to effectuate its remedial purposes. *United States v. Turkette* (1981), 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. One of the most important of those remedies is the forfeiture of assets acquired through racketeering activity. *Russello, supra.*

Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did

not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense "any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C.A. § 1961(1)(A) (West Supp. 1986). The statute was further amended to include "any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter)." 18 U.S.C.A. § 1961(1)(B) (West Supp. 1986).

Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.

Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.

We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications. Thus we cannot agree

with either appellants or the Court of Appeals that the purpose of the Indiana RICO/CRRA scheme, as it pertains to the predicate offense of obscenity, is to restrain the sale or distribution of expressive materials. It is irrelevant whether assets acquired through racketeering activity are obscene or not. They are subject to forfeiture if the elements of a pattern of racketeering activity are shown. The other CRRA remedies, such as license revocation, are also available regardless of the nature of the racketeering enterprise.

There is a dearth of caselaw concerning RICO-based forfeiture of expressive materials. Appellees rely primarily on *Western Business Systems, Inc. v. Slaton* (N.D. Ga. 1980), 492 F.Supp. 513, a case in which the plaintiffs sought a preliminary injunction in an attempt to prohibit prospectively RICO prosecutions based on the predicate crime of obscenity. The plaintiffs asserted that "the statute constitutes a prior restraint on First Amendment freedoms by allowing certain presumptively protected materials to be forfeited to the state." *Id.* at 514.

The court denied the motion for a preliminary injunction. After reserving ruling on the defendants' contention that the plaintiffs were not proper parties to bring the suit, *Id.*, the court found that the plaintiffs had not shown any significant infringement of First Amendment rights, were not in substantial need of protection, had shown no threat of irreparable harm from enforcement of the statute and had "shown little likelihood of eventual success on the merits of their constitutional attack on the Georgia RICO Act." *Id.* at 515.

In its opinion the court focused primarily on the plaintiffs' argument that the statute allows for the forfeiture

of printed matter on the basis that it is probably obscene. According to the court, their "attempted reading does great violence to the words of the statute." *Id.* at 514.

> "As the court reads the statute, Ga.Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.
>
> "Similarly, the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint, would be seizing them upon probable cause to believe that they were subject to forfeiture, and not—as plaintiffs argue—upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything." *Id.*

We agree with court's reasoning that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering law is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity.

Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene.

Underlying the Court of Appeals' opinion was its fear that "these civil remedies invite indiscriminate prosecution." *4447 Corp., supra* at 592. Believing the "draconian" RICO/CRRA statutes to be "prone to abuse given the relative ease with which the state may invoke their sanctions," *Id.*, the court posited that "[t]he potency of the prosecutorial weapon and the threat it poses to the legitimate exercise of First Amendment freedoms obviously exceed the bounds of constitutionally permissible regulation." *Id.* at 601-02.

We do not share the Court of Appeals' fears that prosecutors will abuse the CRRA remedies and that allowing the seizure and/or forfeiture of assets such as those at issue here will lead to the breakdown of the protections the First Amendment undeniably affords to various forms of expression. It cannot be presumed that prosecutorial discretion will be abused to the extent of threatening "the continued existence of bookstores and theaters." *See Id.* at 601. The remedies provided in the CRRA are a legitimate tool in the attack on racketeering activity. To find otherwise would thwart the legislative intent apparent in the inclusion of obscenity as a predicate offense for a showing of a pattern of racketeering activity and would allow those engaged in racketeering activity to effectively shield their proceeds so gained behind a pseudo-constitutional barrier.

In sum, these actions seeking various CRRA remedies were instituted in an attempt to compel the forfeiture of

the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials. We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution.

We now address the issues certified by the respective trial courts for interlocutory appeal. In the Marion County case, the issue is whether a seizure order could be based on alleged obscenity violations not yet litigated.

There are no reported Indiana cases directly confronting the question of whether prior convictions for the predicate offenses are necessary to sustain a conviction for Corrupt Business Influence under Ind. Code § 35-45-6-2. In *Alvers, supra* at 85, the Court of Appeals stated in its recitation of the facts that the defendant "was charged with seven specific acts of two basic types—receiving stolen property and substituting cubic zirconias for diamonds in jewelry that was submitted for repairs, thereby evidencing a pattern of racketeering activity." While it can be implied that there were no convictions for the acts underlying the allegation of racketeering activity, the issue of whether those acts could provide in part the basis for the conviction was not raised on appeal.

Under the federal RICO statute, convictions for the predicate offenses are not required. *Sedima, S.P.R.L. v. Imrex Co.* (1985), 473 U.S. —, 105 S.Ct. 3275, 87 L.Ed.2d 346; *United States v. Malatesta* (5th Cir. 1978), 583 F.2d 748, *cert. denied* (1979), 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59. Nowhere in Ind. Code § 35-45-6-1, which de-

fines "racketeering activity" and "pattern of racketeering activity," is there reference to the word conviction. *See Sedima, supra.* The statute speaks only of committing a "violation" of any of the enumerated predicate offenses.

Had the legislature intended to require convictions for the predicate offenses, it would have so worded the statute. Consequently, we hold that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under Ind. Code § 35-45-6-2.

Appellants make light of the construction of the Indiana RICO statute advanced by the office of the Indiana Attorney General in *J.N.S., Inc. v. State of Indiana* (7th Cir. 1983), 712 F.2d 303, in which the court affirmed the dismissal on standing grounds of the plaintiffs' complaint seeking a declaratory judgment regarding the constitutionality of the Indiana RICO statute as applied to obscenity. As stated by the court, "[w]hile our research discloses no Indiana cases construing the requirement of two 'violations,' at oral argument, a deputy attorney general opined that J.N.S. would have to accumulate two obscenity *convictions* before the state RICO statutes would apply." *Id.* at 306 (original emphasis). That opinion is not binding on this Court, and in any event there is no basis from which to conclude it is a proper construction of the Indiana RICO statute.

The Marion Circuit Court entered its *ex parte* seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind. Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure.

The trial court in the Ft. Wayne case certified two questions: 1) whether the application for seizure violates due process; and 2) whether the order constitutes a violation of the First Amendment. As to the latter question, we have above held that the RICO/CRRA statutory scheme as applied to the predicate offense of obscenity does not violate the First and Fourteenth Amendments. We accordingly find the seizure order does not constitute a prior restraint or in any other manner impinge upon appellants' rights under those amendments.

Concerning the former question, which was not addressed by the Court of Appeals in the majority opinion, we interpret the trial court's inquiry to be whether, in light of procedural due process guarantees, the appellants can be deprived of their property, without an adversary hearing, pending trial on the forfeiture action. Ind. Code § 34-4-30.5-3(b) clearly allows, upon the filing of a forfeiture action under Ind. Code § 34-4-30.5-3(a), for the entry of an order seizing property allegedly subject to forfeiture upon a showing of probable cause to believe a violation of the RICO statute involving the property in question has occurred.

The Marion Circuit Court, although not required to do so by Ind. Code § 34-4-30.5-3, *sua sponte* set trial for 72 hours after the entry of its seizure order. The Allen Circuit Court did not set a trial date after entering the *ex parte* seizure order; nevertheless, we find that the setting of a trial date within such a brief period is not required to guarantee the due process rights of appellants.

At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe a violation of Ind. Code § 35-45-6-2 involving the property has occurred. The reason for an adversary hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind. Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeitu[illegible] be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind. Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the ques- of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In

the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.

Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion.

GIVAN, C.J.
Pivarnik and Dickson, JJ., concur.
Shepard, J., concurs in result with respect to 4447 Corporation v. Goldsmith and dissents with respect to Fort Wayne Books v. State.
DeBruler, J., dissents with separate opinion.

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al.,	)	
	)	
Appellants,	)	NO. 4-1283 A 415
v.	)	
	)	COURT OF
STEVEN GOLDSMITH,	)	APPEALS
	)	
Appellee.	)	NO. 29S04-8703-
v.	)	CV-270
	)	SUPREME
FORT WAYNE BOOKS, INC., et al.,	)	COURT
	)	
Appellants,	)	(Filed
v.	)	March 2, 1987)
	)	
STATE OF INDIANA AND STEPHEN M. SIMS,	)	
	)	
Appellees.	)	

INTERLOCUTORY APPEAL FROM HAMILTON
CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
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and

INTERLOCUTORY APPEAL FROM ALLEN
CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge
Cause No. CC-84-446

DeBRULER, J.—Dissenting

I am in agreement with the thoughtful and thorough opinion of Judge Young of the Fourth District. *4447 Corporation v. Goldsmith* (1985) Ind. App., 479 N.E.2d. 578.

I will surface portions of that opinion in order to re-emphasize the important points.

The majority summarizes with approval appellees' contention that . . . "the purpose of the CRRA remedies is not to suppress speech but rather to compel the forfeiture of assets acquired through racketeering activity" and that . . . "the seizure orders were not entered because appellants' assets were obscene materials but because there was probable cause to believe they were assets subject to forfeiture."

The majority intimates that the challenged legislative scheme here is a legitimate and rational response to the problem of racketeering activity and that the potential impact of the forfeiture on presumptively constitutionally protected expressive materials is irrelevant. Therefore, the majority holds under this relaxed standard of review, that the challenged legislative scheme passes constitutional muster.

The majority opinion misses the mark.

> Supreme Court decisions clearly direct, however, that in cases of this order, "the standard of review is determined by the *nature of the right assertedly threatened or violated* rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed. 671. [Emphasis added].

4447 Corporation v. Goldsmith, supra at 583.

Here, the nature of the right assertedly threatened is appellants' First Amendment Right to sell books: books which until adjudged obscene, an unprotected category of speech, are constitutionally protected.

> "Given the assertion of this right, we are not free to accept uncritically the state's characterization of the padlocking of bookstores and the seizure of their contents as neutral incidents of a campaign against "racketeering", *but rather must subject the state regulation to searching and realistic scrutiny.*" [Emphasis added]

4447 Corporation v. Goldsmith, supra at 584.

Under the circumstances of these cases, a searching and realistic scrutinization reveals that the challenged legislative scheme operates as an unconstitutional prior restraint of speech. As employed by both prosecutors, once a person is found to have engaged more than once in an open retail sale of unprotected speech, he forfeits his rights in protected speech. Such a perfunctory scheme resulting in an entire shutdown is clearly an unconstitutional prior restraint on future protected conduct.

APPENDIX B

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al.,	)	
	)	
Appellants,	)	
	)	
-v-	)	
	)	
STEPHEN GOLDSMITH,	)	
	)	
Appellee.	)	CAUSE NO.
	)	4-1282 A 415 in the
	)	Court of Appeals
	)	
FORT WAYNE BOOKS, INC., et al.,	)	CAUSE NO.
	)	29S04-8703-CV-
Appellants,	)	270 in the Indiana
	)	Supreme Court
-v-	)	
	)	
STATE OF INDIANA and STEPHEN M. SIMS,	)	
	)	
Appellees.	)	

ORDER

DENYING "PETITION FOR STAY OF EXECUTION IN CONNECTION WITH PETITION FOR CERTIORARI".

COMES NOW the Petitioner, Burke Mendenhall, by counsel, Bernard L. Pylitt, and files his "Petition for Stay of Execution in Connection With Petition for Certiorari", alleging as follows:

1. That this cause was initially brought in the Marion County Circuit Court by the Marion County Prosecuting Attorney, Stephen Goldsmith, alleging that the Petitioner, Mendenhall, owned the real estate

at 4266 West 38th Street, Indianapolis, Indiana where an adult bookstore was engaged in racketeering activities as defined in the Indiana Racketeering Influence and Corrupt Organizations Act ("RICO"), Indiana Code 35-45-6-1 *et seq.*

2. On August 1, 1983, the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788, issued Findings of Fact and an Order declaring the property owned by the Petitioner, Mendenhall, at 4266 West 38th Street, Indianapolis, Indiana was subject to forfeiture under the remedies section provided in the Civil Remedies for Racketeering Activities ("CRRA"), Indiana Code 34-4-30.5.1 *et seq* (hereinafter referred to as the "Forfeiture Order").

3. After a change of venue from Marion County, the Hamilton County Circuit Court entered an Order on November 21, 1983 overruling a Motion of a co-defendant, Burton Gorelick, to vacate the Forfeiture Order, which ruling was then appealed to the Indiana Court of Appeals as an Interlocutory Appeal in Consolidated Cause No. 4-1284 A 415 in the Indiana Court of Appeals, Fourth District.

4. On February 2, 1984, Chief Judge Paul H. Buchanan, Jr., Court of Appeals of Indiana, entered an Order upon Interlocutory Appeal modifying the Forfeiture Order of the Marion County Circuit Court dated August 1, 1983, pending the appeal of that matter to the Indiana Court of Appeals. A copy of that Order is attached hereto as Exhibit "A".

5. The Indiana Court of Appeals for the Fourth District in *4447 Corp. v. Goldsmith* (1985), Ind.App. 479 N.E.2d 578, 592 held that the Civil RICO and CRRA statutes at issue constituted facially unconstitional prior restraints in their application to the predicate offense of obscenity.

6. On March 2, 1987, this Court granted a Petition for Transfer and vacated the Opinion of the In-

diana Court of Appeals, and remanded the matter to the Hamilton County Circuit Court for further proceedings not inconsistent with that Opinion.

7. Subsequent to the decision of the Supreme Court of Indiana, the Honorable James E. Noland, Judge, United States District Court for the Southern District of Indiana, in an unrelated criminal matter on June 5, 1987, under Cause Number IP86-20-CR-01 entered an Amended Judgment and Order of Forfeiture in the case captioned *United States of America vs. Burton Gorelick* directing Gorelick to vacate the premises at 4266 West 38th Street, Indianapolis, Indiana and cease business operations at the Plaza Entertainment Center on or before March 2, 1987.

8. From on or about March 2, 1987, to and including August 3, 1987, the premises remained vacant at 4266 West 38th Street, Indianapolis, Indiana.

9. On or about August 3, 1987, a new business entity began business at the location of 4266 West 38th Street, Indianapolis, Indiana.

10. On or about August 6, 1987, members of the Indianapolis Police Department, under the direction of the Marion County Prosecuting Attorney's Office, padlocked the subsequent business operation located at 4266 West 38th Street, Indianapolis, Indiana, allegedly under the authority of the August 1, 1983 Order of the Marion County Circuit Court in this matter, and the November 21, 1983 Entry of the Hamilton County Circuit Court, overruling the defense Motion Vacate the Order of August 1, 1983.

11. On August 13, 1987, Deborah Daniels, Marion County Prosecuting Attorney's Office, advised the undersigned that the new business located at 4266 West 38th Street, Indianapolis, Indiana, was closed under the authority of the August 1, 1983 Order and the November 21, 1983 Entry of the Hamilton County Circuit Court.

12. That the jurisdiction of the Supreme Court of the United States to review this case and petition for certiorari rests upon 28 U.S.C. Section 1257(3), and that the jurisdiction of this Court to issue the stay request is granted by 28 U.S.C. Section 2101(f).

13. That this Court denied Appellant's Petition for Rehearing on June 18, 1987.

14. The Appellant-Petitioner has retained counsel who is in the process of preparing his Petition for Writ of Certiorari to the United States Supreme Court which will be on the merits and will be filed within the proper time requirements as provided for by the Rules of the United States Supreme Court.

15. The reason for applying for a stay of the Order entered by the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788 and the Order of this Court rendered on March 2, 1987 in this matter is that this Court's decision raises an important constitutional question involving the taking of Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the denial of this federal right is the result of a finding by the courts below and is shown by the record to be without evidence to support it.

16. That unless a stay of the Order entered by the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788 and the Order of this Court rendered on March 2, 1987 in this matter is granted, Petitioner, Mendenhall, will be irreparably injured in that he is being denied the right to collect rents from a new business tenant without the benefit of any judicial determination and/or order, and that he will be irreparably injured during the pendency of the case in the Supreme Court of the United States.

THIS COURT, BEING DULY ADVISED IN THE PREMISES, now DENIES the "Petition for Stay of Execution in Connection with Petition for Certiorari", as this Court is without jurisdiction over this matter.

The Clerk of this Court is directed to send a copy of this Order to all counsel of Record.

DONE AT INDIANAPOLIS, INDIANA this 2nd day of September, 1987.

/s/ Randall T. Shepard
RANDALL T. SHEPARD
Chief Justice of Indiana

APPENDIX C

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATRE CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK,	)	
Appellants-Defendants,	)	
-v-	)	Consolidated Cause No. 4-1283 A 415
STEPHEN GOLDSMITH, Prosecuting Attorney for the Nineteenth Judicial Circuit,	)	
Appellee-Plaintiff.	)	

FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., and EROTIC HOUSE BOOKSTORE, INC.,	)	
Appellants-Defendants,	)	
-v-	)	[No. 3-484 A 106 Before Consolidation]
STATE OF INDIANA and STEPHEN M. SIMS, Prosecuting Attorney for the Thirty-Eighth Judicial Circuit,	)	
Appellees-Plaintiffs.	)	

INTERLOCUTORY APPEAL FROM THE
HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge

and

INTERLOCUTORY APPEAL FROM THE
ALLEN CIRCUIT COURT
The Honorable Thomas L. Ryan, Judge

YOUNG, J.

In each of these cases, the state has instituted proceedings against adult bookstores under the Racketeer Influenced and Corrupt Organizations Act (RICO), IND. CODE 35-45-6-1 *et seq.*, seeking remedies available under the Civil Remedies for Racketeering Activity (CRRA) statute, IND. CODE 34-4-30.5-1 *et seq.* The defendants bring interlocutory appeals from the trial courts' denials of their motions to vacate injunctive orders providing for, *inter alia*, the padlocking of bookstores and seizure of the contents thereof. We have consolidated these appeals in order to consider defendants' common challenge to the constitutionality of the RICO and CRRA statutes under the First Amendment in the United States Constitution.

Marion County Prosecutor Stephen Goldsmith initiated the first of these actions on August 1, 1983, when he filed a complaint in the Marion Circuit Court against the individual and corporate defendants, owners and operators of three adult bookstores. The complaint alleged that the bookstores constituted "an illegal enterprise"[1] and that

1. IC 35-45-6-1 defines "enterprise" to include a "sole proprietorship, corporation, partnership, business trust," etc.

the defendants had engaged in "a pattern of racketeering activity"[2] in violation of IC 35-45-6-1 *et seq.* These RICO provisions create an offense of "corrupt business influence," a Class C felony, committed by a person:

> (1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; . . . .

IC 35-45-6-2. The statute enumerates various predicate offenses which constitute "racketeering activity," including obscenity violations under IND. CODE 35-30-10.1-2 (repealed 1983 Acts, P.L. 311; *see now* IND. CODE 35-49-3-1).

Goldsmith in his complaint sought civil remedies created by the Civil Remedies for Racketeering Activity

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2. The RICO statute defines a "pattern of racketeering activity" as:

> engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity. IC 35-45-6-1.

Act. Under IC 34-4-30.5-2, which provides for injunctive relief in response to RICO violations, the trial court, upon a finding by a preponderance of the evidence that a RICO violation has occurred may:

> (1) order a defendant to divest himself of any interest in any enterprise or real property;
>
> (2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;
>
> (3) order the dissolution or reorganization of any enterprise;
>
> (4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;
>
> (5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and
>
> (6) make any other order or judgment that the court considers appropriate.

The CRRA statute further authorizes the prosecuting attorney to seek forfeiture of property incident to corrupt business influence, and to obtain a court order seizing property subject to forfeiture, under IC 34-4-30.5-3:

> (a) The prosecuting attorney in a county in which any of the property is located, may bring an

action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.

Pursuant to this authority, Goldsmith filed along with his complaint a Petition for Seizure of Property Subject to Forfeiture, incorporating by reference the allegations of the complaint and of the probable cause affidavit. This petition alleged that the defendants intended soon to open an additional adult bookstore in furtherance of their "racketeering activity", i.e. "dissemination of obscene material." The petition also asserted that the new bookstore contained numerous obscene items, none of which were specified, and cited possession of these allegedly obscene materials as probable cause to establish RICO violations.

The probable cause affidavit upon which this petition for seizure relied stated that police had visited the two

operating adult bookstores, where they observed sexually-oriented books, magazines, films and videotapes. They purchased four sexually-explicit movies, which they submitted to the court. Visiting the construction site of the soon-to-open bookstore, they were informed that sexually-oriented materials would be available there as well. The police further alleged that the three bookstores constituted a single enterprise under common ownership and control.

On the basis of these allegations, the trial court at the *ex parte* proceedings of August 1, 1983, issued an order that police seize, i.e. padlock, the third bookstore in advance of its opening, as authorized by IC 34-4-30.5-4.[3] While this

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3. This CRRA section specifies the procedures for seizure of property pursuant to IC 34-4-30.5-3 and related RICO provisions:

> (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. . . .
>
> (b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:
>
> (1) place the property under seal;
>
> (2) remove the property to a place designated by the court; or
>
> (3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.
>
> (c) Property seized under subsection (a) is not subject to repleven [sic], but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner.

order permitted the continued distribution of literature and films at the two existing bookstores, it required the defendants to list and preserve all other property pending trial. On August 4, 1983, the defendants appeared and filed motions to dismiss the complaint and to vacate the trial court's order.

Goldsmith on September 8, 1983, filed an amended complaint in the Hamilton Circuit Court, to which venue of the case had been transferred. Reciting allegations materially the same as those of the original complaint,[4] plain-

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4. Neither the original nor the amended complaint alleges prior obscenity convictions of these defendants. This fact raises a serious question whether appellees have stated a cause of action in the case of 4447 Corporation, et al., as the Indiana Attorney General has previously taken the position, in *J.N.S., Inc. v. State of Indiana* (7th Cir. 1983), 712 F.2d 303, that the RICO statute may not be applied to obscenity offenses in the absence of two prior obscenity *convictions*.

In *J.N.S.*, the plaintiff sought a declaratory judgment regarding the constitutionality of the Indiana RICO statute as applied to obscenity, although it had not been charged with violation of that statute. The Court of Appeals affirmed dismissal of the complaint on grounds of non-justiciability. The Court concluded that because J.N.S. had twice been charged but had not yet been convicted of obscenity violations, it had not suffered sufficient actual or threatened injury to present a "case or controversy" as constitutionally required under Article III. In reaching this conclusion, the Court relied in part upon the construction of the RICO statute advanced by the Indiana Attorney General's office:

> While our research discloses no Indiana cases construing the requirement of two 'violations', at oral argument, a deputy attorney general opined that J.N.S. would have to accumulate two obscenity *convictions* before the state RICO statutes would apply. 712 F.2d at 306.

Because this consolidated appeal requires our determination of the underlying constitutional question, we need not address this issue. We note the merits of appellants' contention, however, as the requirements of due process, in addition to the chilling effect of a contrary reading of the statute as applied to obscenity, would almost certainly render it constitutionally infirm even if the statute were otherwise constitutional.

tiff prayed for a panoply of CRRA remedies, including license suspension, corporate charter revocation, and forfeiture of all property related to the operation of these bookstores.

On December 21, 1983, the Hamilton Circuit Court denied defendants' Motion to Dismiss the complaint and to vacate the order of the Marion Circuit Court. This court has granted a stay of that order pending appeal of the denial of defendants' motion to vacate.

In *Fort Wayne Books*, et al., Allen County Prosecutor Stephen Sims has initiated a similar civil action against the owners and operators of three adult bookstores. As in the *4447* case, the complaint alleges an illegal enterprise, the purpose of which is to operate adult bookstores. In this case, the complaint also cites a pattern of racketeering activity consisting of thirty-nine prior obscenity convictions of the three bookstores and their agents between June 1981 and March 19, 1984, the date of the complaint.

Sims in his complaint sought CRRA remedies including license forfeiture and confiscation of defendant's property. The prosecutor accordingly filed a petition for seizure of property, seeking forfeiture of the three bookstores with their entire contents and all corporate assets under IC 34-4-30.5-3.

The forfeiture petition incorporated by reference the allegations of the complaint and the probable cause affidavit. The latter stated that police had been monitoring the activities of the three bookstores and that the defendant corporations and their employees had incurred thirty-nine obscenity convictions. The affiant related that he and other police had recently visited the bookstores, where they observed materials he believed to be obscene.

At an *ex parte* hearing held the same day the complaint was filed, the trial court merely reviewed these documents and heard taped descriptions by police of the contents of seized materials. On this basis, the prosecutor obtained an order directing the sheriff to padlock all three bookstores and to seize their contents.

Noting that this order constituted a constitutionally impermissible prior restraint, the corporate defendants on March 23, 1984, filed a motion to vacate the trial court's order. In the alternative, they sought to modify its terms to allow the continued sale and distribution of materials including books and motion pictures, for which they invoked the protection of the First Amendment.

One week after defendants filed this motion, however, the police seized and hauled away the entire contents of the three bookstores. The defendants responded with an Emergency Motion for Inventory of Property Removed and/or Return of Property. The trial court denied both of these motions, and from the denial of their motion to vacate or modify the court's order, the corporate defendants appeal.

Our disposition of these interlocutory appeals requires resolution of but a single issue: whether the RICO and CRRA provisions invoked against the defendants abridge the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

I.

Because defendants-appellants raise this constitutional challenge, we must employ standards developed by the United States Supreme Court with particular sensitivity to the fundamental role of the freedoms of speech and press

under our constitutional system. The state in the gravamen of its argument essentially urges that we adopt a lesser standard of review, focussing entirely upon the legitimacy of the avowed state purpose of "combatting racketeering" by means of the RICO Act and associated civil remedies. Supreme Court decisions clearly direct, however, that in cases of this order, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Emphraim* (1981), 452 U.S. 61, 68.

Appellants in this case assert their right to distribute and to exhibit materials including books, magazines, and films which have not been adjudged obscene and which therefore presumptively enjoy the protection of the First Amendment. The constitutional guarantee of freedom of the press, appellants rightly contend, embraces the circulation of books as well as their publication. *Bantam Books, Inc. v. Sullivan* (1963), 372 U.S. 58. Specifically, appellants invoke their well-recognized right to freedom from prior restraint of such communicative activity. Given the assertion of this right, we are not free to accept uncritically the state's characterization of the padlocking of bookstores and the seizure of their contents as neutral incidents of a campaign against "racketeering", but rather must subject the state regulation to searching and realistic scrutiny.

The communicative freedoms guaranteed by the First Amendment have long been deemed a "transcendent value" of our constitutional system. *Speiser v. Randall* (1958), 357 U.S. 513, 526. The rationale for treating certain constitutional guarantees as "preferred freedoms" was initially suggested by Justice Stone in his celebrated footnote 4 to

his opinion in *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 152-53, intimating that legislation directly contravening a constitutional prohibition, such as those of the Bill of Rights, may "be subjected to more exacting judicial scrutiny . . . than are most other types of legislation. . . ." A few years later in *Murdock v. Pennsylvania* (1943), 319 U.S. 105, 115, the Court explicitly declared: "Freedom of press, freedom of speech, freedom of religion are in a preferred position." Justice Frankfurter, concurring in *Kovacs v. Cooper* (1949), 336 U.S. 77, 90, eloquently expressed the underlying rationale for this principle:

> . . . without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

The protection of the First Amendment has not been grudgingly restricted to the realm of political speech but has rather been extended to a wide range of expressive activity. Entertainment in the form of motion pictures, broadcast programs, live performances, etc. as well as political and ideological speech, falls within the ambit of the Amendment. *Schad, supra.* Thus, "the setting of the bookstore or the commercial theater [is] each presumptively under the protection of the First Amendment." *Roaden v. Kentucky* (1973), 413 U.S. 496, 504. Our point of departure, therefore, is a presumption that the defendant bookstores have engaged in legitimate First Amend-

ment activity, and that the materials they purvey represent protected speech. We emphasize in this regard that the courts have been loath to draw sharp distinctions among various types of speech; sexually explicit but not obscene materials are entitled to no less protection than other forms of expression. *J-R Distributors, Inc. v. Eikenberry* (9th Cir. 1984) 725 F.2d 482; *Avalon Cinema Corp. v. Thompson* (8th Cir. 1981), 667 F.2d 659.

The Supreme Court has declared a few narrowly-limited classes of expression, including obscenity, to be entirely outside the protection of the First Amendment. In *Roth v. United States* (1957), 357 U.S. 476, 485, the Court first explicitly held that "obscenity is not within the area of constitutionally protected speech or press." As currently defined by the standards set forth in *Miller v. California* (1973), 413 U.S. 15,[5] obscenity is therefore a legitimate object of state regulation, subject to both civil and criminal sanctions. *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 49.

Because of the overriding importance of First Amendment freedoms, however, state authority to suppress obscenity is not untrammeled. As the Court in *Miller* cau-

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5. The Court in *Miller* expounded the following test for determining obscenity:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

413 U.S. at 24.

tioned, "State statutes designed to regulate obscene materials must be carefully limited." 413 U.S. at 23-24. A state may constitutionally impose a prior restraint such as an injunction against the future distribution of obscenity, but only as to *particular* items determined to be obscene, and then only under the rigorous procedural guidelines developed in the line of cases culminating in *Freedman v. Maryland* (1965), 380 U.S. 51, and *Vance v. Universal Amusement Co., Inc.* (1980), 445 U.S. 308. The Court has consistently emphasized that the line between protected and unprotected speech is "finely drawn" and requires the use of "sensitive tools" to discern and enforce that boundary. *Speiser v. Randall,* 357 U.S. at 525. Even in the realm of obscenity, therefore, the courts have evinced concern that criminal and civil sanctions imposed for the commercial dissemination of obscene materials not sweep so broadly as to create a "chilling effect" which would curtail the availability of nonobscene literature and films due to apprehension and self-censorship on the part of distributors and exhibitors. See, *e.g., Smith v. California* (1959), 361 U.S. 147; *Bantam Books, supra.*

The great weight of constitutional authority decided under these general precepts leads ineluctably to our conclusion that the challenged RICO/CRRA provisions are unconstitutional on three distinct yet interrelated grounds. First, they operate as a prior restraint which impermissibly impinges upon the dissemination of protected materials. Second, these measures fail to comply with the procedural safeguards required even for the suppression of *obscene* materials. Finally, independent of our determination that these statutes operate as an unconstitutional prior restraint, their provisions as they relate to

obscenity must fall under the less restrictive means test announced in *United States v. O'Brien* (1968), 391 U.S. 367, for the evaluation of allegedly content-neutral state regulation which has an incidental impact upon free expression.

Each of these theories sounds common chords of First Amendment law, and any one of these approaches warrants the conclusion that the RICO/CRRA statutes are facially unconstitutional as they pertain to the predicate offense of obscenity.[6] Although we rely primarily upon our determination that these statutes constitute a patently unconstitutional prior restraint, we elaborate the alternative theories because they reveal additional constitutional defects of the statutes and definitively dispose of arguments raised by the state. We will therefore discuss each of these mutually-reinforcing theories in detail below.

II.

The prohibition against prior restraints of speech and press has always been regarded as the essential core of First Amendment protection. The Court in *Near v. Minnesota* (1931), 283 U.S. 697, 713-14, first employed the prior restraint doctrine to dismiss an injunction against the press, observing that such suppressive measures represent "the essence of censorship." In the recent case of *Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 559, the Court reiterated, "Prior restraints on speech

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6. For an excellent general formulation of this analysis in a closely related area of First Amendment law, see Trachtman, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power,* 58 N.Y.U.L. Rev. 1478 (1983).

and publication are the most serious and the least tolerable infringement on First Amendment rights."

Accordingly, the Court has applied the strictest standard of review to cases involving any prior restraint of expression arguably within the protective ambit of the First Amendment. As a general matter, "Only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms," as the Court has noted in *NAACP v. Button* (1963), 371 U.S. 415, 438; see also *Avalon, supra.* Even a truly compelling state interest justifies regulation only in the manner least restrictive of speech. See, *e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980), 447 U.S. 557; *Shelton v. Tucker* (1960), 364 U.S. 479.

With regard to prior restraints in particular, the Court has repeatedly asserted, "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books,* 372 U.S. at 70; see also *New York Times v. United States* (1971), 403 U.S. 713, 714; *Near, supra.* The government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, 419; see also *New York Times Co. v. United States, supra.*

This presumption against prior restraints is not absolute; it is subject, however, only to narrowly-delineated exceptions. In *Near,* the Court enumerated "exceptional cases" which might justify restraint in advance of publication, including obscenity. 283 U.S. at 716. Under the subsequent decisions in *Roth* and *Miller,* material ad-

judged to be obscene is by definition unprotected speech and may be restrained prior to distribution. *Paris Adult Theatre I v. Slaton, supra.* The prior restraint doctrine, however, precludes the use of overreaching methods which threaten to curtail protected as well as unprotected speech. Bearing in mind this narrow exception allowing for a governmental ban on obscenity, a constitutional term of art which is not coextensive with sexually-explicit or erotic materials generally, we come inescapably to the conclusion that the obscenity application of the RICO/CRRA statutes renders those provisions fatally overbroad as an unconstitutional prior restraint of protected expression.

We observe initially that the applicability of the prior restraint doctrine to this case is beyond question. "When speech is suppressed in advance of publication or distribution—instead of being permitted to enter the marketplace of ideas before being identified and regulated as unprotected speech—it has been subjected to a prior restraint."[7] This definition perfectly describes the situation before us, in which the state has successfully attempted to padlock bookstores and to seize extensive collections of books, magazines, and films along with the neutral instrumentalities used for their dissemination. Without so much as an allegation of obscenity as to most of the bookstores' inventories of films and publications, the state ultimately seeks permanent revocation of their business licenses as well as forfeiture of these communicative materials and instrumentalities. The impact of such remedies upon the availability of these materials is direct and undeniable—the state has effectively suppressed them prior to dis-

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7. Trachtman, *supra* note 6, at 1493.

tribution. The suppression of entire bookstores inevitably affects protected as well as any unprotected expression, as we must presume absent allegation and proof of the obscenity of each item seized.

Our determination that a prior restraint has been applied to protected speech is virtually dispositive of the present case and extends to the entire range of injunctive and forfeiture remedies available under these statutes. In such a prosecution based upon prior obscenity convictions or the bare allegation of contemporaneous obscenity violations, the application of any one of the enumerated CRRA remedies threatens closure of the defendant bookstores, theaters or similar establishments and therefore poses an impermissible prior restraint.

First, we note the unconstitutionality of the injunctive remedies immediately presented by the trial courts' imposition of seizure orders pursuant to IC 34-4-30.5-3, -4. These sections by their clear terms authorize such a seizure; we thus have no quarrel with the trial courts' implicit interpretation of the RICO/CRRA provisions to allow for this remedy. However, the resulting orders padlocking these bookstores and seizing their contents effectively prevent the circulation of the seized materials and of others which defendants might otherwise disseminate from the premises. This constraint upon the free circulation of presumptively protected materials represents the unconstitutional prior restraint in its most virulent form.

In addition to the injunctive orders seizing defendants' property pending trial, the state seeks as an ultimate remedy the permanent forfeiture of the corporate de-

fendants' real and personal property, including the bookstore premises, their inventories of films and publications, and the instrumentalities involved in the distribution of these materials. Our conclusion regarding the unconstitutionality of the seizure orders applies with even greater force here. A forfeiture remedy extending to presumptively legitimate expression and the facilities used for purposes of such expression is likewise overbroad and therefore facially invalid as a prior restraint.

We are confirmed in this analysis by an earlier decision of this court and by numerous decisions from other jurisdictions, a large majority of which have struck down as impermissible prior restraints similar measures effecting closure of bookstores and theaters on obscenity grounds. Contrary to the state's argument attempting to distinguish these cases, which arise primarily under nuisance and "red light" abatement statutes, we find these decisions precisely analogous to the case before us. Again, we remind the appellees that the vantage point from which we view this constitutional claim is "the nature of the right assertedly threatened or violated rather than . . . the power being exercised or the specific limitation imposed." *Schad,* 452 U.S. at 68.

This court has confronted a similar threat to an adult bookstore defendant's right to freedom from prior restraint in *State ex rel. Blee v. Mohney Enterprises* (1973), 154 Ind. App. 244, 289 N.E.2d 519. In that case, our First District affirmed the trial court's denial of an injunction by which the plaintiff sought on statutory nuisance grounds to restrain an adult bookstore operator from disseminating any printed material whatsoever in the county. Relying pri-

marily upon *Near*, the court noted simply that such an injunction would constitute an impermissible prior restraint of protected communication.

This theme has resounded in most of the numerous state and federal decisions to address the issue in recent years. The Georgia Supreme Court in the representative case of *Sanders v. State* (1974), 231 Ga. 608, 203 S.E.2d 153, struck down a permanent injunction closing an adult bookstore upon a showing of a single prior obscenity violation. The state had invoked its nuisance statute as authorization for this padlock order, a remedy materially identical to the injunctive and forfeiture remedies sought by the state in the present case.

"The problem encountered in applying these laws . . . to justify closing the entire bookstore", the Georgia court began, "is the ancient right of free men to say and print what they wish without prior restraint." 231 Ga. at 611, 203 S.E.2d at 156. After discussing procedural difficulties with the imposition of this sanction, the court continued:

> The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards and creating an unconstitutional restraint upon appellant.

231 Ga. at 613, 203 S.E.2d at 157. In thus concluding that the statute was facially invalid for overbreadth as applied to obscenity violations, the court appealed to underlying First Amendment principles evident also in our foregoing discussion:

> . . . the overly broad coverage contemplated by this statute . . . creates a chilling effect upon the exercise

> of free expression. We cannot throw out the portected to rid ourselves of the unprotected as these laws would require. . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose.

231 Ga. at 614, 203 S.E.2d at 157.

Similarly in *General Corporation v. State ex rel. Sweeton* (1975), 294 Ala. 657, 320 So.2d 668, *cert. denied*, 425 U.S. 904 (1976), the Alabama Supreme Court addressed this question, reversing a judgment ordering an adult theater closed for one year pursuant to the State's "red light" abatement act. The court emphasized that "evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment. . . . The padlocking of appellant's operations for one year constitutes prior restraint at its worst and is patently unconstitutional." 294 Ala. at 665-66, 320 So.2d at 675.

In *People ex rel. Busch v. Projection Room Theater* (1976), 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, *cert. denied*, 429 U.S. 922 (1976), the California Supreme Court tersely disposes of the issue before us, holding that the *Near* doctrine precludes the use of temporary or permanent padlock orders against theaters or bookstores found to have violated obscenity laws:

> We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene

> . . . .we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.

17 C.3d at 59, 130 Cal.Rptr. at 338, 550 P.2d at 610.

Other state courts have almost uniformly adopted this position with regard to injunctive remedies allowing the state to close bookstores or theaters. See, *e.g., Mitchem v. State ex rel. Schaub* (1971), Fla., 250 So.2d 883; *Gulf States Theaters of Louisiana v. Richardson* (1973), La., 287 So.2d 480; *State v. A Motion Picture Entitled "The Bet"* (1976), 219 Kan. 64, 547 P.2d 760; *City of Minot v. Central Ave. News, Inc.* (1981), N.D., 308 N.W.2d 851; *State ex rel. Field v. Hess* (1975), Okla., 540 P.2d 1165; *Davis v. Van Emberg* (1975), 464 Pa. 618, 347 A.2d 712; *New Riviera Arts Theatre v. Davis* (1967), 219 Tenn. 652, 412 S.W.2d 890.

Noteworthy federal decisions on this point include *Spokane Arcades, Inc. v. Brockett* (9th Cir. 1980), 631 F.2d 135, *aff'd. mem.* 454 U.S. 1022 (1981), *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1978), 587 F.2d 159, *aff'd.* on procedural grounds, 445 U.S. 308 (1980), and *Nihiser v. Sendak* (N.D. Ind. 1974), 405 F.Supp. 482, *aff'd.*, 431 U.S. 961 (1977). In *Spokane Arcades,* the court declared Washington's moral nuisance abatement statute unconstitutional because of provisions permitting a court to issue temporary and permanent injunctions and temporary closure orders against businesses which may have distributed obscene materials. Similarly, the *en banc* panel

in *Vance* indicated that the application of Texas nuisance statutes to permit the state to obtain blanket injunctions against the future exhibition of unnamed obscene films would operate as an unconstitutional prior restraint. The court also indicated that a padlock order against the premises where such films had been shown would be likewise unconstitutional:

> The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond . . . is posted, the showing of *any* motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the First Amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near v. Minnesota* . . . .

587 F.2d at 165.

In *Nihiser,* the court held unconstitutional the former Indiana pornographic nuisance statute, IND. CODE 35-30-10.5 (repealed 1983 Acts, P.L. 311), on grounds that it authorized the state to close a bookstore or theater for one year as a consequence of the past sale or exhibition of obscenity. Condemning this padlock sanction as a prior restraint, the court in *Nihiser* also struck down the act's provision authorizing the removal of personal property from the premises declared to constitute a nuisance, observing that "the state has no right to seize and destroy protected materials" such as projection equipment, films, and publications. 405 F.Supp. at 495-96.

As this latter holding of *Nihiser* indicates, the protection of the First Amendment under the *Near* doctrine not only extends to the bookstore premises and to their

inventories of films and publications, but also forbids the confiscation or forfeiture of the neutral instrumentalities used for communicative purposes as well. Personal property such as printing presses, projectors, video equipment, and bookshelves obviously may be used for future dissemination of protected materials as well as of unprotected obscenity. Seizure and forfeiture of such property, as the state seeks in the present case, operates to inhibit free expression and thus constitutes an unwarranted prior restraint. As the court concluded in *State v. A Motion Picture Entitled "The Bet"*, 547 P.2d at 771,

> The Kansas nuisance abatement statute as applied to promoting obscenity is overbroad in authorizing . . . the destruction of equipment, seats or other neutral property designed for use in showing films. Such provisions of the statute are unconstitutional as a prior restraint of freedom of expression. . . . Items of neutral equipment which may be used in the future for legitimate forms of expression, such as movie projectors and theatre seats, may not be destroyed because of past transgressions of obscenity laws.

See also *Maguin v. Miller* (D.Kan. 1977), 433 F.Supp. 223; *United States v. Polak* (E.D.Pa. 1970), 312 F.Supp. 112; *Bongiovanni v. Hogan* (S.D.N.Y. 1970), 309 F.Supp. 1364.

Contrary to this extensive body of authority, a very few courts have upheld blanket injunctions and padlock orders aimed at obscenity.[8] Among the decisions squarely

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8. In addition to *Kidwell, infra*, the Ohio Supreme Court in *State ex rel. Ewing v. "Without a Stitch"* (1974), 37 Ohio St.2d 95, 307 N.E.2d 911, appeal dismissed *sub nom. Art Theater Guild, Inc. v. Ewing*, 421 U.S. 923 (1975), sustained a provision

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addressing padlock orders in the obscenity context, only one has adopted the position advanced by the state in this case. In *State ex rel. Kidwell v. U.S. Marketing, Inc.* (1981), 102 Idaho 451, 631 P.2d 622, appeal dismissed, 455 U.S. 1009 (1982), the Idaho Supreme Court upheld that state's nuisance statute authorizing closure of the offending establishment for one year. The court construed the padlock sanction as an *in rem* penalty against property involved in the commission of obscenity violations, rather than as a prior restraint, and distinguished *Near* on grounds that the Idaho padlock provision did not restrict future speech on the basis of content.

Appellees do not rely on *Kidwell*, as they deny the relevance of authority arising under nuisance and ob-

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for closure of a theater for one year upon a showing of a single obscene film exhibition. The Ohio Court emphasized, however, that the property owner could gain release from the padlock order by filing a bond and demonstrating that the specific nuisance would not recur, and narrowly construed the statute by holding that the nuisance to be prevented by the order was limited to the showing of the particular film adjudged to be obscene. The court thus suggested that the state could not require the theater owner to demonstrate that no obscene films would be exhibited, implying that such a blanket injunction would create an impermissible prior restraint. 37 Ohio St.2d at 105, 307 N.E.2d at 918. In *Fehlhaber v. North Carolina* (4th Cir. 1982), 675 F.2d 1365, however, the court upheld such a blanket injunction prohibiting future distribution of unspecified *obscene* materials.

The Indiana RICO/CRRA statutes impose much more severe sanctions than the courts considered in either of these cases, permitting seizure orders of indefinite duration and creating a remedy of permanent forfeiture which would extend to protected materials and neutral instrumentalities. These decisions are therefore readily distinguishable from the case before us, as well as contradictory to the weight of constitutional authority. See, e.g., *Spokane Arcades, supra; Vance, supra.*

scenity statutes to these RICO/CRRA proceedings. Instead, the state relies exclusively upon *Western Business Systems, Inc. v. Slaton* (N.D. Ga. 1980), 492 F.Supp. 513, in which the court employs similar reasoning to uphold the Georgia RICO statute's forfeiture provisions as applied to the predicate offense of obscenity.

In *Western Business Systems,* the district court denied a preliminary injunction by which plaintiffs sought to restrain future application of the state's RICO act. Because the plaintiffs, sellers of sexually-oriented materials, had not yet suffered prosecution under the statute, the court held that they lacked standing, but gratuitously went on to pronounce the statute constitutional as applied to obscenity. In so holding, the court dismissed plaintiffs' First Amendment overbreadth claim on grounds similar to those adduced in *Kidwell:*

> . . . all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. . . . Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents.

492 F.Supp. at 514.

Along with other courts and commentators, we find the logic of these two cases strained and artificial,[9] and

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9. The only two other courts to embrace the *Kidwell* reasoning have been reversed by reviewing courts. See *Spokane Arcades, Inc. v. Eikenberry* (E.D.Wash. 1982), 544 F.Supp. 1034, *rev'd.,* 725 F.2d 482 (9th Cir. 1984); *State ex rel. Cahalan v. Diversified Theatrical Corp.* (1975), 59 Mich.App. 223, 229 N.W.2d 389, *rev'd.,* 396 Mich. 244, 240 N.W.2d 460 (1976). The Idaho decision has also been critically analyzed in Note, *State ex rel. Kidwell v. U.S. Marketing, Inc.: Prior Restraint and Obscenity Under the Idaho Moral Nuisance Abatement Act,* 19 Idaho L. Rev. 135 (1983), and in Trachtman, *supra* note 6, at 1502-6.

agree with appellants that *Western Business Systems* is wrongly decided, as it contravenes the higher authority of *Vance.* The reasoning evinced in these cases is, moreover, inimical to the principles of *Near v. Minnesota* and of other leading Supreme Court decisions in this area.

The courts in *Kidwell* and *Western Business Systems* dismiss prior restraint claims by characterizing the challenged regulations as content neutral, *in rem* penalties for past illegal conduct. We first address the contention that these padlock and forfeiture orders do not constitute prior restraints but merely represent punishment for criminal offenses. Although the state here proffers this rationale, the constitutional standards embodied in *Near* do not permit us to accept such a justification uncritically: "in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." 283 U.S. at 708.

The prospective effect of these sanctions upon protected expression is undeniable and stems directly from the nature of the statutory scheme as an "anti-racketeering" measure. As applied to obscenity, the direct effect of these RICO/CRRA remedies is the closure of bookstores and theaters. "Since it is clear that purveyors of obscenity are also in part distributors of protected speech, seeking to eliminate obscenity entrepreneurs includes the goal of restricting protected speech in the future, beyond the desire to punish the distribution of unprotected speech in the past."[10] To construe these padlock and forfeiture

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10. Trachtman, *supra* note 6, at 1503.

penalties simply as punishment for past misdeeds would be to ignore their actual operation and effect as prior restraints.

In addition, the *Kidwell* and *Western Business Systems* courts' reliance upon the alleged content neutrality of seizure and forfeiture sanctions is misplaced. We find highly dubious the proposition that these measures, applied in the obscenity context to close adult bookstores, are content neutral in any meaningful sense. More fundamentally, content neutrality regarding the suppressed speech or publication in no way inures a regulatory scheme from a challenge to its constitutionality on prior restraint grounds. The Court in its insightful *Near* opinion does not suggest that content neutrality removes a regulation from the definition of prior restraint; rather, Chief Justice Hughes quotes Blackstone in broadly defining the unconstitutional regulation to include *any* "previous restraints upon publications", 283 U.S. at 713. Fatal to the state's position is the modern authority of *Organization for a Better Austin v. Keefe*, 402 U.S. at 417, in which the Court strikes down as a prior restraint a content neutral order enjoining the distribution of " 'pamphlets, leaflets or literature of any kind.' "

Our foregoing analysis of the property seizure and forfeiture remedies under the prior restraint doctrine applies equally to other RICO/CRRA remedies. The state in *4447 Corp.*, et al., also seeks forfeiture of defendants' business licenses and revocation of their corporate charters. Because these licenses and charters are obviously prerequisites for the corporate defendants' continued operation, their denial or revocation works as effective a prior restraint as do the seizure and other forfeiture sanctions.

Such denial or forfeiture of licenses and charters based upon the past behavior of a business in distributing obscenity has been roundly condemned as a prior restraint by other courts. As the Court of Appeals has succinctly observed in *Genusa v. City of Peoria* (7th Cir. 1980), 619 F.2d 1203, 1219:

> We know of no doctrine that permits the state to deny to a person First Amendment liberties . . . solely because that person was once convicted of a crime or other offense.

As in *Genusa*, the district court in *Cornflower Entertainment, Inc. v. Salt Lake City Corporation* (D.Utah 1980), 485 F.Supp. 777, also strikes down city ordinances authorizing revocation of theater and bookstore licenses based on past obscenity violations. Citing *Vance*, the court expressly rejects the state's argument, central to appellees' position in this case, that this civil closure remedy serves as a penalty for past abuses and therefore does not constitute a prior restraint. On the contrary, the court responds, 485 F.Supp. at 786:

> To reason that an involuntary closure of a motion picture theatre for past obscenity violations does not constitute a prior restraint is clearly contrary to the Supreme Court's definition of prior restraint.

In the recent case of *Gayety Theatres, Inc. v. City of Miami* (11th Cir. 1983), 719 F.2d 1550, the Court of Appeals similarly held that the city ordinance providing for revocation of a theater's or bookstore's license for one year, based solely upon one obscenity conviction, imposed an unconstitutional prior restraint on presumptively protected expression. Relying on the *Near* doctrine and upon

Vance and its numerous progeny, the court observed emphatically that

> the City can no more impose such a prior restraint on the plaintiff than it could by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.

719 F.2d at 1552.

Other state and federal courts presented with the issue of license revocation in response to obscenity violations have unanimously adopted the same view: *Entertainment Concepts, Inc. III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497; *Yuclan Enterprises, Inc. v. Arre* (D.Hawaii 1980), 488 F.Supp. 820; *Evansville Book Mart, Inc. v. City of Indianapolis* (S.D.Ind. 1979), 477 F.Supp. 128; *Bayside Enterprises, Inc. v. Carson* (M.D. Fla. 1979), 470 F.Supp. 1140; *Natco Theatres, Inc. v. Ratner* (S.D.N.Y. 1979), 463 F.Supp. 1124; *Oregon Bookmark Corp. v. Schrunk* (D.Or. 1970), 321 F.Supp. 639; *Perrine v. Municipal Court* (1971), 5 C.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648, *cert. denied*, 404 U.S. 1038 (1972); *City of Delevan v. Thomas* (1975), 31 Ill.App.3d 630, 334 N.E.2d 190; *Alexander v. City of St. Paul* (1975), 303 Minn. 201, 227 N.W.2d 370; *Hamar Theatres, Inc. v. City of Newark* (1977), 150 N.J.Super. 14, 374 A.2d 502; *City of Seattle v. Bittner* (1973), 81 Wash.2d 747, 505 P.2d 126.

These decisions are informed by the central teaching of *Near* that even the most flagrant abuses of the freedoms of speech and press do not justify the imposition of sanctions which prospectively curtail communicative activity. The corporate defendants' right to continue operation of these bookstores may not be abridged on the basis of past

obscenity convictions, whether by padlock order, property forfeiture, or license revocation. The same principle further precludes the state from obtaining an order pursuant to IC 34-4-30.5-2(1)-(3), requiring that defendants divest themselves of any interest in these enterprises, restricting their investment in similar businesses, or dissolving or reorganizing these enterprises. See *Gayety Theatres, supra.*

The present case vividly illustrates the rationale for longstanding hostility to any system of prior restraints under our Constitution. The injunctive and forfeiture remedies to which the state has resorted here threaten to impact dramatically upon public access to controversial materials and divergent opinions. Such provisions allowing the state to close bookstores and theaters are incomparably more repressive than subsequent penalties for distribution of particular obscene materials. Not only are the RICO/CRRA statutes draconian in their effect, but they are also prone to abuse given the relative ease with which the state may invoke their sanctions. Devoid of procedural strictures including the standard of proof of a criminal prosecution, these civil remedies invite indiscriminate prosecution. The operation of these statutes, which is both swift and severe, may indeed curb the availability of obscenity but cuts a broad swath into the realm of protected expression as well. The consequent overbreadth of these measures with their attendant chilling effect on the exercise of First Amendment rights renders the entire statutory scheme constitutionally invalid. We therefore hold that the injunctive remedies of IC 34-4-30.5-2, and the seizure and forfeiture sanctions of IC 34-4-30.5-3, -4, con-

stitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

III.

We have thus initially determined that the RICO/CRRA statutes impose unconstitutional restraints upon protected expression. Because the plaintiffs in this case do not even allege that the entire inventories of these padlocked bookstores are obscene, the seizure orders necessarily restrict some protected materials and must fall under the near-absolute constitutional ban on prior restraints of protected speech.

Additionally, these measures entail procedural defects which would render the proceedings thereunder invalid even as applied to suppress actual obscenity. The mere allegation by local officials that speech or publication is obscene does not end our prior restraint inquiry. As the protected or unprotected nature of the speech remains to be determined, the state must adhere to constitutionally required procedures for its suppression. Otherwise, the resulting seizure or forfeiture order poses an unconstitutional prior restraint notwithstanding the fact the state could legitimately suppress the seized materials as obscenity.

Given the paramount importance of First Amendment guarantees and the threat to those rights posed by overzealous prosecution of unprotected expression, the Supreme Court has outlined exacting procedural safeguards which must attend state efforts to suppress alleged obscenity. To ensure "the necessary sensitivity to freedom of expression", *Freedman v. Maryland* (1965), 380 U.S.

51, 58, the Court has effected a hybridization of First Amendment concerns and traditional due process standards.[11]

At the same time it declared obscenity to be unprotected speech in *Roth*, the Supreme Court began to define the constitutional limits which must condition injunctive measures to control obscenity. In *Kingsley Books, Inc. v. Brown* (1957), 354 U.S. 436, the Court upheld a narrow and precise New York obscenity statute authorizing an *ex parte* injunction against a particular book alleged to be obscene, but requiring trial on the merits within one day and a final decision within two days of trial. Subsequent caselaw indicates that the procedures approved in *Kingsley Books* embody minimal standards for proceedings against obscenity, as the Court has continually refined and reaffirmed these requirements.

In *Speiser v. Randall, supra*, decided the year after *Roth* and *Kingsley Books*, the Court began in earnest the task of elaborating procedural limits to the suppression of unprotected speech. The case presented a challenge to California constitutional and statutory provisions conditioning a tax exemption upon nonadvocacy of the overthrow of government. The Court observed that when the state seeks to restrain unlawful advocacy and thus implicates the "transcendent value" of freedom of speech,

> it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society.

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11. See Monaghan, *First Amendment "Due Process"*, 83 Harv.L.Rev. 518 (1970).

> Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of the restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. (Citations omitted.)

357 U.S. at 521. The Court then proceeded to invalidate the tax provisions on grounds that they impermissibly allocated to the individual the burden of persuasion as to the protected nature of expression.

Subsequent decisions have fleshed out the skeletal requirements suggested by *Kingsley Books* and *Speiser*. In *Marcus v. Search Warrants of Property* (1961), 367 U.S. 717, the court condemned as violative of the Fourteenth Amendment the mass seizure of materials alleged by police to be obscene but with no prior judicial determination of obscenity. The challenged Missouri procedure allowed for issuance of a general warrant merely on the basis of police allegations regarding the existence of obscene materials. Police were empowered under the ensuing warrant to search the premises and to seize whatever in their discretion they deemed obscene. Pursuant to the warrant issued in *Marcus* police searched the warehouse of a wholesale distributor of magazines, newspapers, and books along with five retail newstands. They seized 11,000 copies of 280 publications, most of which were previously unspecified, and most of which were later adjudged nonobscene.

Concluding that this procedure lacked the necessary safeguards to afford due process protection to nonobscene materials, the court emphasized both the *ex parte* nature of the proceeding and the absence of any independent judi-

cial determination of the obscenity issue. Justice Brennan for the Court insisted upon procedures "designed to focus searchingly upon the question of obscenity" prior to any such mass seizure, 367 U.S. at 732, complaining that under the Missouri statute,

> the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of . . . materials considered by the complainant to be obscene . . . . Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.

Id. at 732-33.

The Court in *Marcus* distinguished *Kingsley Books* as sanctioning a limited injunctive remedy against particular named publications and under closely defined procedural safeguards, as opposed to the Missouri scheme which

> inhibited the circulation of publications indiscriminately because of the absence of any such safeguards . . . . *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene.

Id. at 734-36.

In *Quantity of Copies of Books v. Kansas* (1964), 378 U.S. at 205, the Court underscored this prerequisite of an adversarial determination of obscenity prior to any large-scale seizure of expressive materials. In an action under the Kansas obscenity statute, the state attorney general filed an information alleging the obscenity of 59 titles in a

series of sexually-oriented paperback novels. Copies of seven of the books accompanied the information and were reviewed by the trial judge in a brief *ex parte* inquiry. Finding these books obscene, the judge issued a warrant authorizing the sheriff to seize the novels identified by title in the information. Police then impounded all copies of the titles they discovered in the bookseller's possession, some 1715 books in all.

Fatal to this prosecution, the Supreme Court concluded, was the failure to afford appellants an adversary hearing on the question of the books' obscenity. Despite the warrant's specificity as to the materials to be seized, the mass seizure of all copies of the specified titles rendered the procedure constitutionally deficient in threatening to suppress nonobscene books. The fact that a full hearing on the obscenity issue followed the seizure did not impress the Court: "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books." 378 U.S. at 213.

The following year in *Freedman v. Maryland* (1965), 380 U.S. 51, the Court unanimously invalidated the state's motion picture censorship statute as inadequately guaranteeing against inhibition of protected expression. The statute required distributors to submit all films to a censorship board prior to exhibition, and granted the board virtually unfettered discretion to ban films on various grounds including obscenity.

In striking down the Maryland provision as a prior restraint, the Court synthesized themes developed in the earlier cases to require three basic safeguards in any

proceeding to enjoin or otherwise suppress unprotected speech: (1) the censor must bear the burden of proof that the material is unprotected under the First Amendment; (2) a prompt adversarial hearing and final adjudication on the obscenity issue must be assured by statute or by "authoritative judicial construction"; and (3) any prior restraint before judicial review must be strictly limited in duration. 380 U.S. at 58-59.

The Supreme Court has recently reaffirmed these principles in *Vance v. Universal Amusement Co.* (1980), 445 U.S. 308, *aff'g. per curiam* on other grounds, 587 F.2d 159 (5th Cir. 1978). The Court there invoked the *Freedman* guidelines to affirm the Court of Appeals, deeming the Texas nuisance statutes violative of the First and Fourteenth Amendments because they authorized injunctions of indefinite duration prior to a final judicial determination of obscenity and without any guarantees of prompt review of a preliminary finding of probable obscenity.

The Court in *Vance* rejected the state's argument that such blanket injunctions against the exhibition of named or unnamed films would constitute no more objectionable a restraint than would a criminal obscenity proceeding.

> Presumably an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.

445 U.S. at 316. The Court agreed with the conclusion of the Court of Appeals that "the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures . . . precludes the enforcement of these nuisance statutes against motion picture exhibitors." *Id.* at 317. *Vance* thus provides the most recent indication that the Supreme Court will not tolerate injunctive remedies against obscenity in the absence of strict procedural safeguards.

Appellants correctly assert that as a vehicle for the suppression of obscenity, the RICO/CRRA statutes are procedurally deficient under these due process standards developed in the context of First Amendment concerns. Because of these procedural defects, the state may not constitutionally maintain a RICO/CRRA action on the basis of obscenity, even if the statutes' application were limited to materials alleged to be obscene.

First, we address appellant's contention that the *ex parte* nature of the seizure order renders it invalid under the line of cases encompassing *Marcus* and *Quantity of Copies of Books*. These decisions unequivocally require an adversarial determination of obscenity prior to the imposition of such restraints upon the distribution of communicative materials.

In the cases before us, the trial courts have issued orders for the seizure and padlocking of appellants' bookstores, following *ex parte* determinations of probable cause regarding two prior or contemporaneous obscenity violations. The judge in the case of *4447 Corp.*, et al. has apparently reviewed the four films submitted by the prosecution to establish such probable cause. In the Fort Wayne action, the trial court has considered in an *ex parte*

proceeding the appellants' past obscenity convictions, along with police allegations regarding the obscene nature of the bookstores' contents and their taped descriptions of seized materials.

These *ex parte* proceedings do not pass constitutional muster. Even if the entire contents of these bookstores were alleged and subsequently adjudged to be obscene, the *Marcus* and *Quantity* decisions require an adversarial determination of the obscenity of each item prior to the *en masse* seizure of such materials. In each of these cases, the trial courts have made *ex parte* determinations only as to the probability of obscenity violations, with no regard to the obscenity of all seized materials. To the extent that the courts have considered the obscenity of most of these books, films, and magazines, they have relied exclusively upon conclusory assertions and descriptions by police of alleged obscenity. Such *ex parte* proceedings, characterized by the absence of an independent judicial determination of obscenity, are precisely of the order deemed unconstitutional *ab initio* by the Supreme Court in *Marcus* and *Quantity*.

The state's reliance upon *Heller v. New York* (1973), 413 U.S. 483, in this regard is entirely misguided. The Supreme Court in *Heller* approved an *ex parte* determination of probable obscenity only in narrowly-defined circumstances involving seizure of a single copy of an allegedly obscene film for *bona fide* purposes of preserving it as evidence in a criminal proceeding. The Court explicitly disapproved any mass seizures of communicative materials on an *ex parte* basis as in the present case.

The judge issuing the warrant in *Heller* viewed the entire film at a commercial movie house before signing the

warrant for its seizure. The Court upheld this procedure on grounds that an adversary hearing was not required where the state sought merely to secure one allegedly obscene item as evidence. The Court stressed, however, that its approval was conditiond upon the availability of a prompt judicial determination of obscenity in an adversary proceeding. Further, the seizure must not operate as a prior restraint upon exhibition of the film; on a showing that other copies were not available, the court should either return the film or permit the exhibitor to copy it.

The Court in *Heller* specifically stated that it would not retreat from the principles of *Quantity of Copies of Books* and *Marcus* but rather would "scrutinize any large-scale seizures of books, films, or other materials presumptively protected under the First Amendment" to ascertain that the requirements of those decisions were fully met. 413 U.S. at 491. Contrary to appellees' interpretation, *Heller* thus provides no support for the contention that an *ex parte* probable cause determination of prior obscenity violations may constitutionally sustain the indefinite seizure of entire bookstores. Rather, the cautionary terms in which the *Heller* Court couched its holding underscore the unconstitutionality of such an injunctive regulation, the purpose or effect of which is to inhibit free expression prior to a final judicial determination of obscenity.

Heller thus implicates the broader question of the procedural validity of these statutes generally as they provide for remedies of seizures and forfeiture of communicative materials. Not only are the initial *ex parte* proceedings constitutionally deficient; the resulting seizure orders and the statutes' provisions for permanent forfeiture impose continuing restraints which inherently contravene each of

the three requirements of *Freedman v. Maryland*. We conclude that the RICO/CRRA acts as applied to obscenity are structurally incompatible with the *Freedman* guidelines, designed by the Court to mitigate the chilling effect on protected speech of laws which afford courts the discretion to draw the uncertain line between legitimate and unprotected expression.

First, the statutory scheme assigns the state no burden of proof regarding obscenity, beyond the requirement that plaintiffs adduce two predicate offenses. Far from requiring that the state affirmatively demonstrate the obscenity of all materials subject to seizure and forfeiture, the RICO/CRRA statutes do not even permit the defendants to litigate the issue and to establish the nonobscenity of most of the seized books, films, and magazines. The state's burden of showing that defendants have purveyed obscenity in the past hardly satisfies the constitutional requirement that the state prove the obscenity of all suppressed materials.

The statutes' allowance for such blanket suppression of entire bookstores and theaters necessarily violates the second and third *Freedman* standards as well. Unlike the precise measure approved in *Kingsley Books*, these statutes make no provision for prompt adversarial review and more fundamentally, bypass any comprehensive obscenity adjudication. Similarly, the final requirement of *Freedman*—that prior restraint before judicial review be strictly limited in duration—clearly prohibits the indefinite seizure and permanent forfeiture of materials never afforded judicial review at all.

We reiterate that for purposes of these *Freedman* guidelines, as distinguished from our analysis of the stat-

utes' operation as substantive prior restraints, it is irrelevant whether the suppressed materials in fact represent protected or unprotected speech. Even if every item seized from these bookstores might ultimately be adjudged obscene, the seizure orders and any subsequent forfeiture judgments would still be unconstitutional due to these procedural irregularities.

The state claims that these actions are not governed by the procedural strictures peculiar to First Amendment litigation because the RICO/CRRA statutes are not intended as a means of censorship. We have noted above our conclusion that for constitutional purposes, these proceedings must be viewed as the functional equivalent of a nuisance or obscenity action. Again, we must reject the contention that the state may so broadly inhibit the circulation of books, films, and other expressive materials on grounds that they represent incidents of "racketeering activity" and are therefore subject to forfeiture as mere contraband. The Supreme Court has summarily dismissed this proposition in *Marcus*, 367 U.S. at 730-31, noting that the analogy of obscene literature to gambling paraphernalia or other contraband for search and seizure purposes "does not . . . answer the appellants' constitutional claim, but merely restates the issue whether obscenity may be treated in the same way." Concluding that it may not, the Court emphasized that because of the sensitive nature of First Amendment determinations, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731. See also *Quantity of Copies of Books*, 378 U.S. at 211-12.

Our discussion of the procedural irregularities of these statutes and of the instant proceedings thereunder is not

meant to imply that the RICO/CRRA provisions are susceptible of a saving construction by judicial interpretation. Rather, we conclude that any such attempt to render the statutes constitutional would create a complete incongruity never intended by the legislature.

Our analysis of these statutes under the *substantive* prior restraint doctrine has revealed that the sweeping remedies they afford are for most purposes patently unconstitutional. Some courts in considering the constitutionality of nuisance abatement statutes and similar measures as applied to obscenity have avoided the constitutional problem by means of a limiting construction of the statute, simply holding the statute inapplicable to obscenity as a predicate offense. This avenue is not open here, as the statutory scheme before us explicitly creates a predicate offense of obscenity. At best, we could limit the operation of these statutes to the seizure and forfeiture of particular items alleged and subsequently adjudged to be obscene. However, consideration of the *procedural* requirements of the prior restraint doctrine indicates that grave constitutional problems would even so continue to plague this application of the statutes. The attempt to preserve the statutes' constitutionality by a narrowing construction, therefore, would be an unnecessarily tortuous exercise, creating a provision anomalous in relation to the overall operation of the RICO/CRRA statutes. Moreover, the eviscerated version of the acts as applied to obscenity would add nothing to the prosecutorial tools now afforded by our criminal obscenity statute. We will not ascribe to the legislative intent such an absurd result. Accordingly, we conclude that the seizure orders against these defendants and the statutes' application to obscenity generally

must be characterized as both substantively and procedurally unconstitutional under the prior restraint doctrine: as prior restraints of protected speech, or as impermissible procedures for restraining speech which may or may not be protected.

IV.

We note finally the constitutional infirmity of the RICO/CRRA statutes under the *O'Brien* doctrine. Even conceding to the state the validity of its central arguments regarding the nature and purpose of this regulatory scheme, we conclude that its sanctions are unconstitutional as applied to obscenity, given the availability of less restrictive means in furtherance of the state's legitimate purpose.

In *United States v. O'Brien* (1968), 391 U.S. 367, the Supreme Court confronted a First Amendment challenge to governmental regulation of an apparently content-neutral nature, the federal prohibition against destruction of selective service registration cards. The defendant, convicted under this statute for burning his draft card in symbolic protest, challenged the punitive sanctions for his politically expressive act on First Amendment grounds. The Court in upholding the statute formulated a framework for assessing the incidental impact of a general regulation upon free expression, holding that:

> . . . a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.

391 U.S. at 377.

The Court thus refined the least restrictive means doctrine applied in earlier First Amendment cases such as *Shelton v. Tucker* (1960), 364 U.S. 479. *Shelton* involved a challenge to an Arkansas statute requiring public school teachers to file an annual affidavit disclosing all organizational affiliations and contributions. Dismissed for his refusal to file such an affidavit, petitioner Shelton contended that the statute exceeded the state's legitimate purposes. The Supreme Court agreed, observing that although the state may have had a substantial interest in investigating the competence and fitness of teachers,

> . . . that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

364 U.S. at 488.

O'Brien applies this principle to legislation which does not on its face implicate First Amendment concerns such as the associational rights asserted in *Shelton*, but which incidentally affects free speech. The *O'Brien* decision further addresses this problem in the context of symbolic expressive acts, or conduct which is "intertwined with expression," *Cox v. Louisiana* (1966), 379 U.S. 559, 563, an area in which the Court has employed a balancing approach rather than the virtual presumption of unconstitutionality applied to legislative abridgements of "pure speech."

The state relies on the *O'Brien* doctrine, asserting that the RICO/CRRA provisions advance a compelling state interest which should be balanced against the First Amendment rights claimed by appellants. The state must there-

fore characterize appellants' operation of bookstores alleged to have purveyed obscenity as a course of *conduct,* i.e., a "pattern of racketeering activity," which is entitled to a diminished level of constitutional scrutiny relative to purely expressive activity.

Under well-established First Amendment principles, we must reject this characterization. The commercial distribution of books, films and other expressive materials prior to their adjudication as obscenity must be regarded as communicative activity which the First Amendment presumptively protects. Any subsequent adjudication of obscenity removes the subject materials from the sphere of constitutional protection but does not alter the essential communicative character of appellants' activity in operating a bookstore or theater.

The state also asserts that the RICO/CRRA statutes are motivated by a compelling state interest in curbing "racketeering activity" or "organized crime." The statutes as applied here, however, define "racketeering" solely in terms of the predicate offense of obscenity. Their potential operation to close bookstores and theaters upon a showing of two such violations triggers a heightened degree of scrutiny which requires that we realistically construe the state purpose underlying the obscenity application of these statutes to be the suppression of obscenity.

The regulation of obscenity does clearly fall within the state's constitutional authority under its police powers. *Paris Adult Theatre I v. Slaton,* 413 U.S. at 68-69, and thus complies with the initial requirement of *O'Brien.* We further assume for the sake of this discussion that combatting obscenity represents a substantial governmental

interest, as the Supreme Court has implied. *Id.* Because obscenity is unprotected by the First Amendment, we also grant the state's contention that the governmental interest in eradicating obscenity is unrelated to the suppression of free speech. The challenged statutes, however, run afoul of the final prong of the *O'Brien* test—they are unduly suppressive in light of the state interest involved.

A number of courts in striking down measures similar in their operation and effect to the RICO/CRRA statutes have noted the availability of less draconian means of achieving the state's goal. See, *e.g., Sanders v. State* (1974), 231 Ga. 608, 612, 203 S.E.2d 153, 156. Emphasizing the mandate of the First Amendment that the state employ "sensitive tools" for such regulation, the courts have noted that criminal obscenity prosecutions and precise injunctive remedies are appropriate because narrowly tailored to the legitimate goal of removing from circulation particular items adjudged to be obscene. Here, in contrast, the sweeping injunctive and forfeiture remedies threaten to effect the closure of any bookstore or theater which has twice disseminated obscenity. Their impact upon protected materials is undeniably direct and severe.

In many respects, our analysis of the statutes' overbreadth under the *O'Brien* test intersects with our discussion of their overbreadth under the prior restraint doctrine. In the latter context, we have concluded that the regulatory scheme with its seizure and forfeiture provisions constitutes a prior restraint, void for overbreadth because it inhibits the distribution of protected as well as unprotected expression. The *O'Brien* approach similarly focusses on the manner in which the statute impacts upon

protected expression, but does not depend upon a determination that these statutes impose a prior restraint. Rather, *O'Brien* provides an alternative rationale for our holding that these statutes are unconstitutional as applied to obscenity: their dramatic impact upon protected expression is more severe than essential to the furtherance of the state's interest in curtailing the distribution of unprotected materials.

The recent case of *J-R Distributors, Inc. v. Eikenberry* (9th Cir. 1984), 725 F.2d 482 is illustrative of the constitutional defects of this statutory scheme from the *O'Brien* perspective. In *J-R Distributors,* the Court of Appeals invalidated the Washington anti-obscenity statute, partly on grounds that it impermissibly provided for unlimited civil fines based on the total profits of an establishment deemed a moral nuisance due to the distribution of obscenity. Such fines would therefore, the court observed, "be based on profits from the *sale of protected materials* in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there." 725 F.2d at 494. Because of the regulation's consequences for constitutionally protected speech, the court held,

> . . . it is impermissible, in an anti-obscenity statute, to provide that the amount of the fine shall be based, even in part, on the proceeds from constitutionally protected material. . . .
>
> By focusing on the place where the obscene materials are sold or exhibited rather than the unprotected materials themselves, the civil fine provision endangers protected speech.

Id.

The court in *J-R Distributors* draws a telling analogy between this unlimited civil fine provision and anti-obscenity padlocking remedies. While the latter have been consistently declared unconstitutional principally on grounds of the familiar presumption against prior restraints, both remedies "have the effect of preventing the dissemination of protected speech simply because obscene speech originated from the same location." *Id.* at 495, and it is this effect which renders all such remedies constitutionally objectionable. Addressing a construction which the state attempts to bestow upon the regulatory scheme in the present case, the court observes:

> It may be argued that the protected speech is not being punished but that it only serves as a measure of the appropriate punishment. Such an argument is not persuasive. The crucial point is that free speech is far too sensitive a subject matter to serve as the measurement for civil or criminal penalties.

Id.

Although the court in *J-R Distributors* does not explicitly cite *O'Brien,* it meticulously employs the *O'Brien* framework in analyzing the First Amendment issue. The court first notes the state's constitutional power to regulate nuisances, an exercise of the police power which the courts have consistently treated as a legitimate or substantial state interest. Observing that the unlimited fine provision applies uniquely to businesses affected by the anti-obscenity statute, whereas the state's general nuisance statute sets forth minimum and maximum civil penalties, the court questions whether such differential treatment " 'suggests that the goal of the regulation is not unrelated to the suppression of expression;' " such a goal is of course

presumptively unconstitutional. *Id.* (quoting *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983), 103 S.Ct. 1365, 1375). Finally, the court implicitly applies the last prong of the *O'Brien* test, concluding that the basing of fines on profits from the sale or exhibition of constitutionally protected materials is unnecessary to the achievement of the legitimate state goal of suppressing obscenity as a moral nuisance. Rather, the state "could have achieved its legislative goals by more carefully tailored means that would be less restrictive of free expression," the court concludes, citing *Shelton v. Tucker*. *Id.* at 496.

This application of the least restrictive means standard is equally apposite to the cases before us. Even if we were to accept the state's characterization of the confiscatory RICO/CRRA remedies as imposing an *in rem* penalty for past criminal conduct rather than a prior restraint, *J-R Distributors* teaches that the consequences of this regulation for protected speech are constitutionally unacceptable. Any such punishment for obscenity violations must be calibrated to the particular distribution of obscenity and must not implicate the distribution of non-obscene materials or profits from the sale thereof. The RICO/CRRA provisions for seizure and forfeiture of entire bookstores or theaters, including films, publications, and the neutral instrumentalities for their dissemination, or for the closure of such establishments by means of license revocation, etc., represent an *unduly* suppressive response to the problems occasioned by obscenity.

We therefore conclude that, however incidental such restrictive effects may be to the general regulatory scheme, the RICO/CRRA remedies as the statutes are applied to obscenity directly and necessarily inhibit the

dissemination of materials protected by the First Amendment. These broad remedies are not essential to the advancement of the state's interest in suppressing obscenity, which may be accomplished by the less restrictive means of criminal prosecutions and injunctive remedies against specified obscene materials. Under the *O'Brien* doctrine, therefore, the challenged provisions are inconsonant with the requirements of the First Amendment.

V.

In passing upon the constitutionality of these statutes, we are mindful of the current climate of opinion and of political pressures to close adult bookstores and similar establishments. It is the function of this and other courts, however, to insulate basic constitutional guarantees from the temporary vagaries of political expediency and from the vicissitudes of public opinion. Although constitutional doctrines may evolve in response to changing social conditions, we may not sacrifice principles nurtured over centuries to the fleeting passion of the hour.

Many find sexually-explicit films and publications unpalatable; to others they represent a valuable source of entertainment. Unless and until such materials are adjudged to be obscene, they are entitled to the full protection of the First Amendment and of Article I, § 9 of the Indiana Constitution. The availability of adult materials, however controversial, is an accommodation we make to the maintenance of a pluralistic, democratic society. The enduring value and ultimate test of First Amendment principles, as Justice Holmes observed, is "not free thought for those who agree with us, but freedom for the thought

that we hate." *United States v. Schwimmer* (1929), 279 U.S. 644, 654-55 (dissenting opinion).

The RICO/CRRA statutes as applied to the predicate offense of obscenity inherently lend themselves to constitutional abuses both flagrant and insidious. Although adult bookstores and theaters may be dispersed through zoning regulations, sexually-oriented entertainment may not be regulated out of existence in a particular locality. *Young v. American Mini Theaters* (1976), 427 U.S. 50; see also *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61; *Avalon Cinema Corporation v. Thompson* (1981), 667 F.2d 659. Yet local prosecutors may employ the RICO/CRRA provisions to padlock and seize the contents of one bookstore after another until by direct application or by chilling effect, the state has entirely eradicated such establishments. Between the first such closure and the last we can draw no meaningful distinction.

Moreover, the very "neutrality" which the state claims for the impact of the injunctions and forfeitures under these statutes enhances the potential for their abuse. In the guise of a telling argument, the state concedes that the obscenity of the seized inventories of books, magazines, and films is irrelevant and need not even be alleged. This argument reflects an accurate reading of the statutes but also reveals the deeply-flawed nature of the regulatory scheme as a response to obscenity. May *avant-garde* booksellers and theaters be padlocked and forfeited to the state upon a showing that alongside literary, political, and cinematic classics, they have twice disseminated controversial works subsequently adjudged to be obscene? Our entire foregoing discussion may be distilled into the conclusion

that the guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters. The potency of the prosecutorial weapon and the threat it poses to the legitimate exercise of First Amendment freedoms obviously exceed the bounds of constitutionally permissible regulation.

In striking down the prior restraint imposed upon a newspaper in *Near v. Minnesota*, 283 U.S. at 718, the Court quoted James Madison:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press .... [I]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding proper fruits.

This principle remains a vital one today; the rights of those espousing unpopular causes and controversial views must be upheld, or the rights themselves lose all security. Nor may the state override this principle in the context of obscenity prosecutions, as the Court has observed in *Bantam Books*, 372 U.S. at 66:

> ... the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a special instance of the larger principle that the freedoms

of expression must be ringed about with adequate bulwarks . . . . (Citations omitted.)

These considerations infom the emphatic decisions of other courts in striking down similar legislation and mandate our conclusion that the RICO/CRRA provisions as they pertain to the predicate offense of obscenity may not constitutionally stand. Accordingly, we remand these causes to the trial courts for proceedings consistent with this opinion.

Miller, P.J. concurs;
Conover, J. dissents with opinion

CONOVER, J.

DISSENTING OPINION

I dissent. The Indiana RICO/CRRA statutory scheme passes constitutional muster.

Our legislature intended the RICO/CRRA statutes should receive a broad construction, as does the federal RICO statute, *Russello v. U.S.* (1983), — U.S. —, 104 S.Ct. 300-301, so as to better curb racketeering generally in this state. Specifically as to the cases before us, it is apparent our legislature intended RICO/CRRA to be a vehicle for the suppression of obscene materials offered for sale to the public if such materials are part of the assets of a racketeering activity which the state seeks to eradicate. Thus, the central questions in these interlocutory appears are:

1. whether a state may confiscate obscene materials when they are part of the assets of a racketeering activity, and

2. if so, whether the Indiana RICO/CRRA statutory scheme passes constitutional muster in light of the First Amendment.

I. *Obscenity Subject to State Action*

Prior to 1973, no clear-cut majority spoke for the United States Supreme Court in obscenity cases. In that year, however, a five to four majority spoke in three cases. They are *Miller v. California* (1973), 413 U.S. 15; *Paris Adult Theatre I v. Slaton* (1973), 413 U.S. 49, both decided the same day, and *Heller v. New York* (1973), 413 U.S. 483, decided the following day. Thus, these cases are the only reliable precedent for our purposes.

In *Miller*, the Supreme Court said

> This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment (citing cases). 'The First and Fourteenth Amendments have never been treated as absolutes [footnotes omitted].'

Miller, 413 U.S. at 23. The majority here, in essence, adopts the "absolutist" approach long advocated by Mr. Justice Douglas. This school argues because the term "obscenity" cannot be precisely defined, First Amendment protection is absolute as to all printed or photographic materials, they are not subject to state action under any circumstances. This approach was discussed and rejected by the *Miller* Court, *cf.* 413 U.S. at 27-28.

Obscene material is subject to state actions because

> . . . . there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights

and interests "other than those of the advocates are involved." citing case) Those include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> "It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* (Emphasis in original). Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not." . . . (Emphasis added.) As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society . . .," (citing case) (dissenting opinion).

. . .

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the

> development of human personality, can be debased and distorted by crass commercial exploitation of sex. *Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively* simply because there is no conclusive evidence or empirical data. (Emphasis supplied).

Miller, 413 U.S. at 57-60, 63. The states have a legitimate interest in suppressing salacious matter. RICO/CRRA as enacted and here applied, is Indiana's legislative response to obscenity offered for sale to the public when it constitutes part of the assets of a racketeering activity.

II. *The RICO/CRRA Statutory Scheme Constitutional*

The majority holds the RICO/CRRA statutes unconstitutional under the facts of these cases "on three distinct yet interrelated grounds", namely,

1. they operate as a prior restraint upon First Amendment-protected materials,
2. they fail to comply with procedural safeguards required even for suppression of obscene materials, and
3. they fail the less restrictive means test announced in *U.S. v. O'Brien* (1968), 391 U.S. 367, for evaluation of allegedly content-neutral state regulation having an incidental impact upon free expression.

I believe the majority is simply wrong on each count.

The encapsulated facts before us are:

1. the complaints allege the appellants have engaged in a pattern of racketeering activity as that term is defined in the RICO statute, and the state seeks o impose the remedies available to it under CRRA upon the appellants so as to terminate their racketeering activities;

2. additionally, the State has moved for immediate seizure of the defendants' assets, as authorized by I.C. 34-4-30.5-3(b);

3. importantly, a *judge* of a court of general jurisdiction *has heard evidence* and *determined* there was *probable cause for seizure* in each case as required by CRRA before the seizure of assets took place; and

4. the assets seized consisted of furniture, fixtures, bank accounts, display cases, file cabinets, office machinery, and similar items, and books, magazines motion picture films, and video tapes offered for sale to the public.

The majority concludes because books, magazines, motion picture films, and video tapes offered for sale to the public at large were part of the assets seized, the RICO/CRRA statutes are unconstitutional as to those materials. While I agree with the majority we must never permit the slightest abridgement of free speech as guaranteed by the First Amendment in any form including statutory prior restraint, it is readily apparent the materials here involved do not enjoy First Amendment protection. They are nothing more than pure, undiluted obscenity.

As the majority notes, the test for obscenity is succinctly stated in *Miller*. There the Supreme Court said

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the purient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. at 24. With this test in mind, I state the facts presented to the trial judges in each of these cases in some detail.

In *4447 Corp.*, the probable cause affidavit of an Indianapolis Police detective sergeant assigned to its Vice branch was introduced as evidence. It recites he visited one of the appellants' establishments, the Adult Toy and Gift Shop in Indianapolis. While there, he viewed sexually explicit materials offered for sale, including magazines, video tapes, sexual aid devices, and eight millimeter motion picture films. He purchased two such films entitled "Anal Madness" and "Spin the Bottle". Each had sexually explicit cover displays. Review of these films revealed men and women engaged in deviate sexual conduct and sexual intercourse. He then went to the "Live Peep" section of the store and entered a "conversation booth" where he talked by telephone to a female. After putting money in a coin operated device as she directed, lights came on on her side of the booth. After tipping the female at her suggestion, she removed her clothing, laid on the floor, and performed erotic gyrations calculated to titillate the viewer sexually.

The detective then went to World Video in Indianapolis, another of defendants' establishments. There he saw X-rated video tapes and eight millimeter films displayed for sale. After negotiations, he purchased two films entitled "Sexual Negotiations" and "Afternoon Delight". He asked the store manager to discount the video tape "Hot Summer Night", but she warned "it was pretty rough." He then left without the video tape, but called another police officer to enter the establishment and identify the two persons with whom he had dealt. One of them

told the identifying officer she was opening a new store at 38th Street and Lafayette Road in Indianapolis. The affiant's review of the additional films he purchased at World Video revealed men and women engaged in sexual intercourse and deviate sexual conduct.

The next day affiant returned to the Adult Toy and Gift Shop and purchased the films "Big Load" and "Gyro Sex". These two films also depicted men and women engaged in sexual intercourse and deviate sexual conduct. The same day another detective went to World Video and purchased the video tape titled "Hot Summer Night". It portrayed four men forcing a young female to perform oral sex, sexual intercourse, and their beating of her with a belt.

Three days later, another detective went to the Plaza Entertainment Center near 38th Street and Lafayette Road in Indianapolis. Although the business appeared to be open, the detective discovered upon entering there were several construction workers present. However, sexually explicit magazines, films and other materials were displayed for sale. Upon inquiry, one worker told the detective the store would not be open until Monday. He then showed the detective the "live peep" and mini theater sections, indicating the theater portion would not be completed until December.

Based upon those facts, his examination of other documents, and his numerous investigations into businesses of this nature, the detective sergeant stated he reasonably believed all three locations were under common ownership and control, part of the same enterprise, and being operated by the various corporations and individuals named as de-

fendants in the case in a manner violative of the Indiana RICO statute.

In *Ft. Wayne Books*, the prosecutor sought seizure of assets under facts paralleling those in *4447 Corp.* However, probable cause in *Ft. Wayne Books* additionally was based upon nineteen convictions of these corporations for distributing obscene matter for consideration and nineteen convictions of individuals who acted as agents of those corporations for the same offenses. Such evidence clearly demonstrates two or more incidents of racketeering activity, and the obscene nature of the materials at issue in each case.

Although the First Amendment does not protect obscene materials as a limitation on the police power of the states under the Fourteenth Amendment, *Paris Adult Theater I*, 413 U.S. at 54; *Miller*, 413 U.S. at 23-25; *Kois v. Wisconsin* (1972), 408 U.S. 229, 230, they are entitled presumptively to First Amendment protection initially, simply because they consist of books, magazines, movies, and video tapes. The constitutional rub comes at this point. To pass constitutional muster, a statutory scheme seeking to suppress obscene matter must also leave undisturbed those materials which qualify for First Amendment protection. It is on this point many prior statutory strategies have been impaled upon the First Amendment.

Only a few of the scores of cases cited by the majority bear directly upon the question of whether Indiana's RICO/CRRA statutory scheme falls within current constitutional parameters.

In *Freedman v. Maryland* (1965), 380 U.S. 51, the United States Supreme Court struck down a state scheme

for the licensing of motion pictures because it did not require resolution of the obscenity question with reasonable promptness by a judicial determination in an adversary proceeding prior to imposition of a valid *final* restraint. *Id.*, 380 U.S. at 58. The Supreme Court later explained its holding in *Freedman* in these words

> The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." . . .
>
> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd. v. Conrad (1975), 420 U.S. 546, 560, 95 S.Ct. 1239, 1247.[1] It further stated in that decision the *Freedman* rule applied not only to motion pictures and live plays, it also applied to materials, *cf. United States v. Thirty-Seven Photographs* (1971), 402 U.S. 363, (customs agents seized imported materials) and *Blount*

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[1] In this case a municipal board denied the promoters of the musical "Hair" use of a municipal theatre. The board made that determination because of outside reports it had received "the production would not be in the best interest of the community." In a district court action after the promoter's application for preliminary injunction had been denied, the district court sitting with an advisory jury determined "Hair" was obscene and denied a permanent injunction.

v. Rizzi (1971), 400 U.S. 410, (postal laws authorized postal officials to restrict use of the mails).

In *Southeastern Promotions* the Supreme Court said

> Procedural safeguards were lacking in several respects. The board's system did *not* provide a procedure for *prompt judicial* review. (Emphasis supplied.)

Southeastern Promotions, 420 U.S. at 561.

Does the Indiana statute CRRA provide procedural safeguards "designed to obviate the dangers of a censorship system" by providing "a procedure for prompt judicial review" in cases where materials presumptively entitled to First Amendment protection are involved? Clearly it does. I.C. 34-4-30.5-3(b) provides

. . .

> (b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order *upon a showing of probable cause* to believe that a violation of IC 35-45-6-2 *involving the property in question* has occurred. (Emphasis supplied.)

Not only are presumptive First Amendment materials so protected, *all* property subject to immediate seizure receives like treatment under CRRA's provisions. Judicial review is required prior to seizure of any property.

Does the fact this judicial review is *ex parte* render this procedure objectional under the *Freedman* rule? Again, the answer is no.

Chief Justice Burger, speaking for the majority, cogently answered this question in *Heller*.[2] He said

> This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. (Citations omitted.) In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. In *Lee Art Theater v. Virgina, supra,* the Court went so far as to suggest that it was an open question whether a judge need "have viewed the motion picture before issuing the warrant." Here the judge viewed the entire film and, indeed, witnessed the alleged criminal act. It is not contested that the judge was a "neutral, detached magistrate," that he had a full opportunity for independent judicial determination of probable cause prior to issuing the warrant, and that he was able to "focus searchingly on the question of obscenity." (Citations omitted.)
>
> In *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), and *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), we held that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint.*" 402 U.S., at 367, 91 S.Ct., at 1403, quoting 380 U.S., at 58, 85 S.Ct., at 738 (emphasis added).
>
> . . . Even in those cases, we did not require that the adversary proceeding must take place prior to

---

[2] In *Heller,* a New York Criminal Court judge watched an entire allegedly obscene film at a theatre at the request of an assistant district attorney. Upon its conclusion, the judge issued warrants, the film was seized, then used as evidence in a later criminal action.

> *initial* seizure. Rather, it was held that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship." (Citations omitted.) . . . If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. . . .
>
> With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection. (Citations omitted.) The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal intereference with public circulation pending litigation.

Heller, 413 U.S. at 489, 492-493, 93 S.Ct. at 2793, 2795.

From my review of these cases, I perceive the rule to be when a non-judicial determination of obscenity is made in First Amendment cases, the statutory scheme involved must place the onus on the determining authority to carry the proceedings promptly forward to a *final* judicial determination of the obscenity question after an adversarial hearing. The defendant is not required to take the initiative in such cases. The rule is otherwise, however, when the proceedings at issue are initially begun, as here, in a judicial setting. In such cases the procedural scheme must provide for

> (a) an *initial* determination the materials to be seized are, in fact, obscene, and

(b) assurance a prompt *final* judicial determination as to obscenity is readily available to any interested party.

However, there is no onus on the plaintiff, after the initial *ex parte* determination, to push the matter to a final hearing on the obscenity issue.

As to the availability of a prompt final hearing under RICO/CRRA, the seizure provisions are but another form of civil attachment. On that subject, Ind. Rules of Civil Procedure, Trial Rule 64 reads, in part

> (A) *Ancillary remedies to assist in enforcement of judgment.* At the commencement of and during the course of an action, all remedies providing for seizure of . . . property are available under the circumstances and in the manner provided by law and existing at the time the remedy is sought.
>
> The remedies thus available include, without limitation, . . . attachment . . . or equivalent legal or equitable remedies, however designated . . .

CRRA provides a civil remedy to the state for the pursuit of racketeering assets. Thus, the provisions of Indiana's civil attachment statute, I.C. 34-1-11-1, et seq., were and are available to the appellants at anytime.[3] I.C. 34-1-11-33 reads in part

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[3] We note parenthetically the trial court in *4447 Corp.* sua sponte set that case for final hearing on August 4, three days after the initial ex parte hearing on August 1. Appellants appeared that day and filed dilatory motions. Although no date for a final obscenity hearing was set by the trial court in *Ft. Wayne Books*, the initial hearing was held, the appellants appeared three days later, but also filed dilatory motions instead of promptly seeking the *final* adversarial hearing on the obscenity question to which they were, and are, entitled, as noted in the main text.

> Any defendant against whom an order of attachment has been issued may, after appearing to the action, move to have the attachment discharged and restitution awarded of any property taken under it;
>
> . . . .

Under this statutory scheme, a prompt final adversarial hearing on the obscenity question was available to appellants. In both *4447 Corp.* and *Ft. Wayne Books* the appellants have filed dilatory motions rather than seek the final adversarial hearing to which they are entitled. Similar facts were present in *Heller*. The Court there said

> A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired. Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" *those delays caused by the choice of the defendant.* (Citations omitted.) In this case, the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S., at 439, 77 S.Ct., at 1326. (Emphasis supplied and footnote omitted.)

Heller, 413 U.S. at 490-491. Thus, delay in a prompt final adversary hearing on the obscenity question in both the

cases before us is chargeable to the appellants not the appellees.

The majority ignores the facts before us when it says in section III of its opinion "the protected or unprotected nature of the speech remains to be determined. . . ." The character of these materials initially has been determined by a disinterested magistrate in each case. They are obscene. Because the RICO/CRRA statutory system mandates an initial judicial hearing prior to seizure, and any interested party is assured of a prompt final hearing on the obscenity question, it is constitutional.

The majority eschews *Heller* calling it inapplicable here because it involved only one film which was held by the state as evidence to be used in a later prosecution. Rejection of *Heller* is unwarranted because it was intended to be precedential authority for cases involving larger quantities of obscene materials, per note 7 of that opinion.

Referring to *Marcus* and *Quantity of Books*, this note 7 reads

> In particular, *Marcus* involved seizure by police officers acting pursuant to a general warrant of 11,000 copies of 280 publications. 367 U.S., at 723. *Unlike this case*, there was *no independent judicial determination of obscenity* by a *neutral, detached magistrate*, nor were the seizures made to preserve evidence for a criminal prosecution. *Id.*, at 732. The sole purpose was to seize the articles as contraband and to cause them "to be publicly destroyed, by burning or otherwise." *Id.*, at 721 n. 6. In *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), 1,715 copies of 31 publications were seized by a county sheriff, *also without any prior judicial determination of obscenity* and, again, for the sole purpose of destroying the publications as contraband. *Id.*, at 206-209. (Emphasis supplied.)

Heller, 413 U.S. at 491. As things now stand in these cases, the materials in question have been stripped of their presumptive First Amendment protection. By judicial decree, they constitute obscene matter no more entitled to First Amendment protection than a sack of doorknobs.

A. *RICO/CRRA Has No "Chilling Effect" on First Amendment Rights*

The majority asserts RICO/CRRA has a "chilling effect"[4] upon First Amendment rights. Again, I disagree. Such contention is inapplicable here because Indiana's statutory scheme provides for judicial review before seizure. In *Freedman* the Court said the "chilling effect" of a censorship order administratively imposed is dispelled by a statutory procedure requiring prompt judicial action for its enforcement, as does RICO/CRRA as applied to these cases, *cf.* 380 U.S. at 60.

B. *RICO/CRRA Is Not "Overbroad"*

A statute is "overbroad" when it burdens or punishes activities protected by the First Amendment in a substantial degre as well as those materials not entitled to First Amendment protection. *Broadrick v. Oklahoma*

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[4] Any law or practice which has the effect of seriously discouraging the exercise of a constitutional right, including the right to free speech, is said to have a "chilling effect." *North Carolina v. Peace* (1969), 395 U.S. 711, 89 S.Ct. 2027; *United States v. Jackson* (1968), 390 U.S. 584, 88 S.Ct. 1209; Black's Law Dictionary, Fifth Edition (1979), at 217.

(1973), 413 U.S. 601, 617, 93 S.Ct. 2908, 2918; *NAACP v. Button* (1963), 371 U.S. 415, 433, 83 S.Ct. 328, 338; *Kunz v. New York* (1951), 340 U.S. 290, 304, 71 S.Ct. 312, 320; *Thornhill v. Alabama* (1940), 310 U.S. 88, 97, 60 S.Ct. 736, 742.

Patently, RICO/CRRA operates with surgical precision on obscenity. Materials entitled to First Amendment protection never can be put in jeopardy under those provisions because *no* presumptively-protected First Amendment matter may be seized by the State prior to a judicial determination of obscenity. The main target here is obscene materials, not presumptively-protected First Amendment materials. Thus, this statutory scheme is not "overbroad." *See, Broadrick,* 413 U.S. at 615-17; 93 S.Ct. at 2917-18.

C. *RICO/CRRA Does Not Violate the "Less Restrictive Means" Test*

The majority claims RICO/CRRA fails the "less restrictive means test" of *U.S. v. O'Brien* (1968), 391 U.S. 367. I demur to that statement.

Under *O'Brien,* state regulation is sufficiently justified if

(a) it is within the constitutional power of government,

(b) it furthers an important or substantial governmental interest,

(c) the governmental interest is unrelated to the suppression of free expression, and

(d) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The majority concedes the first three requirements, but claims the incidental restriction on protected material is greater than necessary or essential to the furtherance of Indiana's governmental interest. Again, I disagree.

The majority reaches the wrong conclusion when it asserts there must be some First Amendment-protected materials suppressed because no allegations in the complaints deny their presence. The character of the material at issue has been judicially determined for our purposes. A disinterested magistrate has determined all are obscene. Further, a prompt final adversarial hearing is available to appellants at any time. If any First Amendment-protected material is present that fact will be determined at the final obscenity hearing. Any such prior restraint is merely incidental and transitory. If any is present, it will be returned to the stream of commerce after the final hearing. Thus, the *O'Brien* test is in all respects fulfilled. Until the final hearing, the evidence preponderates all materials seized are obscene.

Although the above discussion fully states my position, I must address the majority's repetitive characterization of the State's actions in these cases as "padlocking bookstores," and the ominous, if unintended, innuendos that phrase invokes as to our legislature and the public officials here involved.

Under the evidence, neither the trial judge who issued the seizure orders nor the law enforcement officials who carried out those orders should be accused of "padlocking

bookstores." Such a characterization is uncalled for. They have lawfully confiscated the assets of persons and corporations allegedly engaged in patterns of racketeering activity, a part of which is the selling of the illicit contraband discussed above. It is their right and *duty* to do so under RICO/CRRA. They have padlocked "porno shops" in the public interest not "bookstores."

I would affirm the trial court in each case, and remand both for further proceedings.

APPENDIX D

STATE OF INDIANA)) SS: COUNTY OF ALLEN)		IN THE ALLEN
STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT, Plaintiff,	))))))))	CIRCUIT COURT
vs.	)	CAUSE NO.
FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC., MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; MR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC.; MARK A. BROOKS,	))	84-446 ORDER

THE GROUP d/b/a EUROPEAN)
INVESTMENTS N V,)
THE GROUP d|b|a THEATRE A)
CORPORATION,)
NANCY S. JOHNSON,)
CYRUS B. COOPER,)
)
Defendants.)

Comes now the Prosecuting Attorney of the 38th Judicial Circuit, Stephen M. Sims, and files his Complaint For Injunctive Relief From Corrupt Business Influence and Action For Forfeiture of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3 (a) and comes now the Prosecuting Attorney and files his Petition for Seizure of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-3 and submits therewith a "Probable Cause Affidavit" as part thereof, which are in the following words and figures:

(H. I.)

And the Court having examined said petitions and probable cause affidavit and having heard evidence on same NOW FINDS THAT:

1. That said petitions and probable cause affidavit comply with requirements of Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3;

2. That the Court having reviewed said petitions and probable cause affidavit and having heard evidence on same finds pursuant to Indiana Code 34-4-30.5-3 and Indiana Code 34-4-30.5-2;

a) That the Prosecuting Attorney for the 38th Judicial Circuit has filed an action for forfeiture of any property used in the course of, intended for the use in the course of, derived from or realized through conduct in violation of Indiana Code 35-45-6-2;

b) That said action was brought in the Allen Circuit Court, which has proper jurisdiction of same;

c) That the Prosecutor has properly filed a petition for property "subject to forfeiture" to be seized by a law enforcement agency, and has simultaneously filed a proper probable cause affidavit;

d) That the probable cause affidavit submitted with said petition for seizure of "property subject to forfeiture" does in and of itself establish probable cause and the Court now finds that there is probable cause that Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc., and the other defendants, have formed an enterprise that is and has violated Indiana Code 35-45-6-2 and that said defendants have used the following specific real property, the buildings thereon and all of the contents of said buildings for actual use in the course of, or intended use in the course of, or that same have been derived from, or realized through, conduct in violation of Indiana Code 35-45-6-2:

i) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building;

ii) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana,

together with the building and all of the contents of said building;

iii) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The Sheriff of Allen County is ordered to seize that property "subject to forfeiture" which is commonly known as:

a) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

b) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

c) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

2. That pursuant to Indiana Code 34-4-30.5-4 (b), the Sheriff of Allen County is directed to make such seizure immediately upon receipt of this Order and may make such seizure in one or more of the following manners:

a) Place the property under seal;

b) Remove the property or any part thereof to a place designated by the Court; or

c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

3. The Sheriff of Allen County is specifically authorized to use officers under his command to effectuate this Order as well as any Fort Wayne police officers allowed to him by the Fort Wayne Police Department;

4. The defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., are ordered by this Court to avoid removing any liquid assets now in the State of Indiana from the State of Indiana, or from dissipating any bank accounts or secreting same until further order of this Court.

ALL OF WHICH IS ORDERED THIS 19TH DAY OF MARCH, 1984.

/s/ Thomas L. Ryan
Judge, Allen Circuit Court

APPENDIX E

STATE of INDIANA
CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

Cause Number
29S04-8703-CV-00270
LOWER CAUSE
C83-346

4447 CORP., ET AL VS STEPHEN GOLDSMITH, STEPHEN SIMS ET AL

You are hereby notified that the SUPREME COURT has on this day 6/18/87 "APPELLANTS' PETITION FOR REHEARING" IS HEREBY DENIED THIS 18TH DAY OF JUNE, 1987. SHEPARD, C.J., CONCURS IN THE DENIAL OF REHEARING IN 4447 CORPORATION V GOLDSMITH BUT WOULD GRANT REHEARING IN FORT WAYNE BOOKS, INC. V STATE IN A SEPARATE OPINION. DE BRULER, J., WOULD GRANT REHEARING. GIVAN, PIVARNIK AND DICKSON, JJ., WOULD DENY REHEARING, WITHOUT OPINION

WITNESS my name and the seal of said Court, this 18th day of June, 1987

/s/ Dan Heisen
Clerk Supreme Court,
Court of Appeals and Tax Court

IN THE
SUPREME COURT OF INDIANA

4447 CORPORATION, et al., Appellants, v. STEPHEN GOLDSMITH, Appellee,	)	No. 4-1293 A 415 in the Court of Appeals
FORT WAYNE BOOKS, INC., et al., Appellants, v. STATE OF INDIANA AND STEPHEN M. SIMS, Appellee.	)	No. 29S04-8703-CV-270 in the Supreme Court

ON PETITION FOR REHEARING

Shepard, C.J., concurring in part and dissenting in part.

I join in the Court's denial of rehearing in *4447 Corporation v. Goldsmith*, though I take a somewhat different view of the case. However, I would grant rehearing in *Fort Wayne Books v. State* and vacate the trial court's seizure order.

The two cases which have been consolidated for consideration of their common legal issues differ substantially in the degree to which the State has afforded the defendants opportunity for a hearing on the merits underlying the seizure of their property. The importance of such an opportunity has long been recognized by the Court as a part of due process:

> It is fundamental that no person can be deprived of any article which is recognizable by the law as property, without a judicial hearing, after due notice. No degree of misconduct, or wrong, can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have the opportunity to contest the ground upon which the forfeiture is claimed.

State v. Robbins (1890), 124 Ind., 308, 312, 24 N.E.2d 978, 979.

The properties in question in this case are bookstores which have not been subject to final forfeiture but have been ordered seized as property subject to possible forfeiture. Because the owners have been deprived of their "continued possession and use of the goods," such deprivation can only be imposed in a manner consistent with due process. *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556, 573 (1972).

Both seizure orders in these cases were issued after *ex parte* hearings without notice to appellants. In both cases, there was a judicial determination of probable cause that the defendants had violated the Racketeer Influences and Corrupt Organizations Act (RICO), Ind. Code § 35-4-6-1, and that the property was subject to forfeiture under the Civil Remedies for Racketeering Activity Act, Ind. Code § 34-4-30.5-1. The Marion County order set a trial on the merits just four days after the seizure. The two operating bookstores in Marion county were allowed to continue operating, but they were required to preserve certain business equipment and list other property. A third bookstore, as yet unopened, was sealed.

The Allen County order did not set a trial date and the parties appeared before the court only after appellant Fort

Wayne Books filed a motion to vacate or modify the order. Three operating Allen County bookstores were sealed and their contents hauled away. Those stores remain closed for more than a year until the Court of Appeals granted a stay.

Issuance of a seizure order *ex parte* does not of itself violate due process. Extraordinary circumstances may justify seizure without notice or hearing. Such seizure is permissible if: 1) the seizure serves significant governmental purposes, 2) notice and hearing might frustrate the purpose of the government purpose, for example, by allowing destruction or removal of the property to be seized, and 3) seizure is not initiated by self-interested third parties. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974).

The court may issue an *ex parte* order initially, but the order cannot be continued indefinitely. Some federal courts facing similar situations have required the government to establish by a preponderance of the evidence, at an adversarial hearing, that is is likely to prove at trial that the defendant is guilty of a violation of the statute and that the property is subject to forfeiture. *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Rogers*, 602 F.Supp. 1332 (D. Colo. 1985); *United States v. Veon*, 538 F.Supp. 237 (E.D.Cal. 1982).

A somewhat different test was used by the district court in *United States v. Beckman*, 562 F.Supp. 488 (E.D. Mich. 1983). That court required the government to prove by clear and convincing evidence that the property sought to be restrained was involved in a RICO violation, that the property was subject to forfeiture, and that the govern-

ment had reasonable grounds to believe that the defendant was likely to make the property inaccessible.

Both of these tests are consistent with standard due process analysis, balancing the individual's interest in avoiding limitations on liberty and the governmental interest in preserving assets which may be subject to forfeiture.

The fact that the property seized here is material that may be protected by the First Amendment should play an important part in determining what due process requires. Though this Court determined that seizure was not an unconstitutional prior restraint, the nature of the material seized is still important in a determination of due process. "[D]ue process calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494, 92 S.Ct. 2593 (1972).

Even an *ex parte* order seizing expressive materials may not violate the First Amendment. "This Court has never held, nor even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized." *Heller v. New York*, 413 U.S. 483, 448, 93 S.Ct. 2789, 2792, 37 L.Ed.2d 745, 751 (1973).

Stricter standards, however, have been applied to the seizure of communicative materials. "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband." *A Quantity of Books v. Kansas*, 378 U.S. 205, 211-212, 84 S.Ct. 1723, 1726, 12 L.Ed.2d 808, 813 (1964). "An order issued in the area of First Amendment rights

must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. Princess Ann*, 393 U.S. 175, 183, 89 S.Ct. 347, 353, 21 L.Ed. 2d 325, 332-333 (1968).

The United States Supreme Court has enunciated procedural safeguards designed to obviate the dangers of seizing constitutionally protected matters. The burden in these procedures is on the government to show that the communication is unprotected. There must be a judicial determination in an adversary proceeding within a brief period following the seizure to assure the proper sensitivity to freedom of expression. The restraint in advance of the final determination on the merits must be limited to the preservation of the *status quo*, and there must be a prompt final judicial decision. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

While these procedures were designed in cases which required a judicial determination of obscenity not required here, they are instructive as to the kinds of procedures necessary to safeguard both individual rights to property and society's interest in preserving free expression. Reading these requirements and those standards governing seizure of non-expressive material, I am led to the following standards for seizure of expressive material where the government claims the right of seizure on grounds other than the content of the material.

A court may issue an *ex parte* seizure order initially following a judicial determination of probable cause. I would require that the seizure be followed shortly thereafter by an adversarial hearing at which the State bears the burden of proving that the property was used to commit or derived

from a RICO violation. The court must then balance the interests of the individual property owner with the State's interest in preserving the property subject to forfeiture to determine if pre-forfeiture seizure is warranted. If such restraint is required, the court must also consider society's interest in protecting freedom of expression and limit the restraint to the protection of the *status quo*. In short, the order must be fashioned to use the least restrictive means, a traditional requirement for State action which indirectly affect expressive activity. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Finally, the court must provide for a prompt final determination on the merits.

The statutes authorizing the seizure of property subject to forfeiture through a RICO violation do not provide procedures which comply with these due process requirements. Ind. Code § 34-4-30.5-3(b) allows for seizure upon a judicial determination that there is probable cause to believe that a RICO violation involving the property has occurred. Ind. Code § 34-4-30.5-4 requires the prosecuting attorney to bring an action for forfeiture "promptly" and provides that property be returned if an action is not instituted within 180 days of the seizure.

The Supreme Court, when faced with a federal statute that authorized seizure of obscene materials by customs officials but failed to prescribe time limits for institution and completion of forfeiture proceedings, chose to construe the statute to bring it within constitutional bounds. Relying on the legislative history of the statute, which reflected a clear intent that forfeiture actions be timely, the Court required that an action be brought within fourteen days of seizure and that a final determination be made within sixty days.

United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).

Clearly, Indiana's provision for release of property when an action is not brought within one hundred eighty days lies well outside these parameters. However, that general provision applies to seizures of both expressive and non-expressive materials. Delay in bringing forfeiture proceedings may not rise to the level of due process violation when the material seized is non-expressive. Whether delay in bringing a forfeiture action against non-expressive material is unreasonable should be determined by weighing the length of the delay, the reason for the delay, the defendant's assertion of his rights and any prejudice which he suffers thereby. *United States v. $8,850*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed2d 143 (1983).

Thus, the one hundred eighty day time limit could satisfy the due process requirements for seizure of non-expressive property but be insufficient to provide due process for the seizure of expressive property. Even though we do not have available the extensive legislative history of the Indiana forfeiture statute[1], it could be construed to apply more stringent time limitations on the seizure of expressive materials, thus giving it a saving construction and allowing the application of that construction in this case. Without such

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[1]The Uni 1 States Supreme Court, in imposing a constitutionally valid time limit for bringing a forfeiture action against allegedly obscene materials seized by customs officials, relied on the record of debates in the Senate, early drafts of amendments to the statute, and changed circumstances since the statute was enacted in 1930, to determine that the legislature intended that the statute require a prompt determination following the seizure of expressive materials. *United States v. Thirty-seven Photographs*, 402 U.S. 363, at 370-372.

a construction, it is unconstitutional as applied to the seizure of expressive materials.

If the statute is given a saving construction, the Marion County order satisfies the requirements of due process. Upon issuing the order, the court set a trial date for a prompt adversarial hearing. The restraint was limited to maintaining the *status quo*, while preserving the property for possible forfeiture.

The Allen County order, however, does not comply with due process. The order was not limited to preserving the *status quo;* indeed, the entire contents of three bookstores were hauled away and kept under lock an key for an entire year. The court did not set an adversarial hearing. The fact that the court heard appellant's motion to vacate the order four days after the seizure is unavailing. A hearing had at the instigation of the defendant on his own motion necessarily places the burden of proof on the defendant. Due process requires a prompt adversarial hearing at which the State bears the burden. *See Carroll*, 393 U.S. 175.

Indiana's forfeiture statute should be construed to place stringent time limits on forfeiture of seizure of expressive materials, to require a prompt adversarial hearing and to limit restraint to maintaining the *status quo*. Because the Marion County proceedings complied with these requirements, its order should be affirmed. Because the Allen County proceedings did not provide for a prompt adversarial hearing and because the restraint went beyond that needed to preserve the *status quo*, that seizure order should be vacated.

APPENDIX F

CHAPTER 30.5

CIVIL REMEDIES FOR RACKETEERING ACTIVITY

34-4-30.5-1. *Definitions.*—As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) Is the object of corrupt business influence (IC 35-45-6-2); or

(2) Has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. [IC 34-4-30.5-1, as added by Acts 1980, P.L. 199, § 1; P.L.308-1985, § 1.]

34-4-30.5-2. *Action by prosecuting attorney to enjoin violation of IC* 35-45-6-2*—Orders.*—The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) Order a defendant to divest himself of any interest in any enterprise or real property;

(2) Impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) Order the dissolution or reorganization of any enterprise;

(4) Order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) Order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) Make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. [IC 34-4-30.5-2, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-3. *Action by prosecuting attorney for forfeiture of property—Orders.*—(a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any

circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shal. order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. [IC 34-4-30.5-3, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-4. *Seizure of property by law enforcement officer—Seizure without court order—Disposition pending forfeiture and final disposition—Return to owner.*—(a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) The seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the court; or

(3) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to [replevin], but is considered to be in the custody of the law enforcement officer making the se e, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 [34-4-30.5-3] of this chapter. If an action is not filed within one hundred eighty [180] days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. [IC 34-4-30.5-4, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-5. *Actions by aggrieved person.*—(a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive

relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. [IC 34-4-30.5-5, as added by Acts 1980, P.L. 199, § 1; P.L. 308-1985, § 2.]

34-4-30.5-6. *Collateral estoppel.*—In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. [IC 34-4-30.5-6, as added by Acts 1980, P.L. 199, § 1.]

CHAPTER 6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

35-45-6-1. *Definitions.*—As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). [IC 35-45-6-1, as added by Acts 1980, P.L. 199, § 2; P.L.190-1984, § 1.]

35-45-6-2. *Corrupt business influence—Penalty.*—(a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony. [IC 35-45-6-2, as added by Acts 1980, P.L. 199, § 2.]

ARTICLE 49
OBSCENITY AND PORNOGRAPHY

35-49-1-1. *Applicability of definitions.*—The definitions in this chapter apply throughout this article. [IC 35-49-1-1, as added by P.L.311-1983, § 33.]

35-49-1-2. *Distribute.*—"Distribute" means to transfer possession for a consideration. [IC 35-49-1-2, as added by P.L.311-1983, § 33.]

35-49-1-3. *Matter.*—"Matter" means:

(1) Any book, magazine, newspaper, or other printed or writter. material;

(2) Any picture, drawing, photograph, motion picture, or other pictorial representation;

(3) Any statue or other figure;

(4) Any recording, transcription, or mechanical, chemical, or electrical reproduction; or

(5) Any other articles, equipment, machines, or materials. [IC 35-49-1-3, as added by P.L.311-1983, § 33.]

35-49-1-4. *Minor.*—"Minor" means any individual under the age of eighteen [18] years. [IC 35-49-1-4, as added by P.L.311-1983, § 33.]

35-49-1-5. *Nudity.*—"Nudity" means:

(1) The showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering;

(2) The showing of the female breast with less than a fully opaque covering of any part of the nipple; or

(3) The depiction of covered male genitals in a discernibly turgid state. [IC 35-49-1-5, as added by P.L.311-1983, § 33.]

35-49-1-6. *Owner.*—"Owner" means any person who owns or has legal right to possession of any matter. [IC 35-49-1-6, as added by P.L.311-1983, § 33.]

35-49-1-7. *Performance.*—"Performance" means any play, motion picture, dance or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons. [IC 35-49-1-7, as added by P.L.311-1983, § 33.]

35-49-1-8. *Sado-masochistic abuse.*—"Sado-masochistic abuse" means flagellation or torture by or upon a per-

son as an act of sexual stimulation or gratification. [IC 35-49-1-8, as added by P.L.311-1983, § 33.]

35-49-1-9. *Sexual conduct.*—"Sexual conduct" means:

(1) Sexual intercourse or deviate sexual conduct;

(2) Exhibition of the uncovered genitals in the context of masturbation or other sexual activity;

(3) Exhibition of the uncovered genitals of a person under sixteen [16] years of age;

(4) Sado-masochistic abuse; or

(5) Sexual intercourse or deviate sexual conduct with an animal. [IC 35-49-1-9, as added by P.L.311-1983, § 33.]

35-49-1-10. *Sexual excitement.*—"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal. [IC 35-49-1-10, as added by P.L.311-1983, § 33.]

35-49-2-1. *Obscene matter or performance.*—A matter or performance is obscene for purposes of this article if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value. [IC 35-49-2-1, as added by P.L.311-1983, § 33.]

35-49-3-1. *Importation or distribution of obscene matter.*—A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age. [IC 35-49-3-1, as added by P.L.311-1983, § 33.]

35-49-3-2. *Activities related to obscene performance.*—A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance commits a class A misdemeanor. However, the offense is a class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age. [IC 35-49-3-2, as added by P.L.311-1983, § 33.]

35-49-3-3. *Providing obscene matter and performances before minors.*—A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred feet [500'] of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(6) Misrepresents his age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors; or

(7) Misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors;

commits a class A misdemeanor. [IC 35-49-3-3, as added by P.L.311-1983, § 33.]

35-49-3-4. *Defenses.*—It is a defense to a prosecution under section 3 [35-49-3-3] of this chapter for the defendant to show:

(1) That the matter was disseminated or that the performance was performed for legitimate scientific or educational purposes;

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library

that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment;

(3) That he had reasonable cause to believe that the minor involved was eighteen [18] years old or older and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was eighteen [18] years old or older; or

(4) That he was a salesclerk, motion picture projectionist, usher, or ticket taker, acting within the scope of his employment and that he had no financial interest in the place where he was so employed. [IC 35-49-3-4, as added by P.L.311-1983, § 33.]

APPENDIX G

IN THE
COURT OF APPEALS
State Of Arizona
Division One

STATE OF ARIZONA,	)	I CA-CR 9471
	)	
Appellant,	)	
	)	Department C
v.	)	
	)	
STEVEN FELD, LARRY CHABLER,	)	OPINION
	)	
	)	
Appellees.	)	
	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause CR-148389

The Honorable Alan S. Kamin, Judge

REVERSED AND REMANDED

CORCORAN, Judge

Defendants Steven Feld and Larry Chabler were charged by Count I of the criminal indictment with conducting an illegal enterprise through racketeering. The other three counts of the indictment alleged the exhibition of obscene films by various combinations of the individual defendants and a corporate defendant, C.A.T., Inc., dba Erotica Motel. Defendants Feld and Chabler moved to dismiss Count I and the trial court granted the motion and the state appealed. *See* A.R.S. § 13-4032(1); *Litak v. Scott*, 138 Ariz. 599, 676 P.2d 631 (1984). C.A.T., Inc. is

not a party to this appeal. Defendants moved to delay trial of the other counts pending resolution of this appeal. The motion was granted. We vacate the order of dismissal and reinstate Count I.

The trial court explained its reasoning for granting the motion to dismiss, which we summarize as follows:

> 1. The pre-conviction remedies of A.R.S. § 13-2314(C) constitute impermissible prior restraints on protected expression when employed in RICO/obscenity prosecutions.
>
> 2. Similarly, the post-conviction remedies of § 13-2314(D) are generally inappropriate for application in obscenity cases.
>
> 3. To try to interpret § 13-2314(B), (C) and (D) in such a way as to render them constitutional would require a tortuous interpretation which would not reflect the legislature's intent.
>
> 4. The civil burden of proof made applicable by § 13-2314(F) further complicates the constitutional problems of the remedies.
>
> 5. Once the civil remedies of § 13-2314 have been made inapplicable to obscenity prosecutions, to allow the use of obscenity as a predicate offense for racketeering makes no sense, because the only remaining effect is to convert conduct that is a class 6 felony under A.R.S. § 13-3502 into a class 3 felony under § 13-2312, which cannot be the legislative intent in making obscenity a predicate offense under the RICO statutes.

The issue presented is whether the trial court erred by finding that the Arizona organized crime and fraud statutes (RICO), A.R.S. §§ 13-2301, *et seq.*, are unconstitutional as applied to obscenity proceedings, and by granting defendants' motion to dismiss Count I. RICO is an

acronym for the federal Racketeer Influenced and Corrupt Practices statutes, 18 U.S.C. §§ 1961, *et seq.*, upon which the Arizona racketeering statutes are based. *See* A.R.S. §§ 13-2312 to -2315, Historical Notes; *Baines v. Superior Court*, 142 Ariz. 145, 148, 688 P.2d 1037, 1040 (App. 1984).

Under RICO,

> ["r]acketeering" means any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred . . . and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving: . . . [o]bscenity.

A.R.S. § 13-2301(D)(4). A.R.S. § 13-3501(2) defines an item as obscene when: (a) the "average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest; . . . (b) [such person] would find that the item depicts or describes, in a patently offensive way, sexual activity; . . . [and] (c) [t]he item, taken as a whole, lacks serious literary, artistic, political or scientific value."[1]

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[1]The United States Supreme Court's opinion in *Pope v. Illinois*, — U.S. —, 107 S. Ct. 1918, — L. Ed. 2d — (1987), does not affect our statute. In *Pope*, the court reaffirmed the tripartite test for judging whether material is obscene, as articulated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The court noted that *Smith v. United States*, 431 US. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977), held that

> [T]he first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards.

. . . .

(Continued on next page)

The state argues that the remedies set forth in A.R.S. § 13-2314 are constitutional on their face, and if not, must be interpreted in such a way as to be constitutional, if possible. The state also urges that even if some remedies are unconstitutional, the trial court was not justified in finding that obscenity could not be used as a predicate offense under the RICO statutes. Defendants urge that the majority of the prejudgment and post-judgment RICO remedies are unconstitutional as applied to obscenity, and that it makes little sense for the court to try to save any of the provisions once the unconstitutional portions thereof are excised. Defendants also argue that the crime of illegally conducting an enterprise through obscenity is unconstitutionally vague.

We need not here recount the long history of the law dealing with obscenity. *See State ex rel. Collins v. Superior Court* [*Scott*], No. 17962-SA (Ariz. Sup. Ct. July 2, 1986). In general, publications are presumed to be protected from governmental interference pursuant to the first amendment of the United States Constitution. *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L.Ed. 2d 757 (1973). Obscenity is not within the area of consti-

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(Continued from previous page)

> [As to *Miller's* third prong], [t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

— U.S. at —, 107 S. Ct. at 1920-21, — L. Ed. 2d at —. Thus, the third prong of A.R.S. § 13,3501(2) must be analyzed according to this reasonable person standard, which is entirely consistent with the language in our statute.

tutionally protected speech or press and may therefore be regulated by the State. *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); *State v. Book-Cellar, Inc.,* 139 Ariz. 525, 679 P.2d 548 (App. 1984). However, "[w]hile obscenity is not constitutionally protected, the procedure by which we determine what is obscene, unprotected speech directly implicates the first amendment because the threat of criminal prosecution chills freedom of expression." *State ex rel. Collins v. Superior Court* [*Scott*], slip op. at 18 (dissent). The line between protected and unprotected speech is finely drawn and requires the use of sensitive tools to discern and enforce the boundary. *E.g., Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975). The legislature, by making obscenity a predicate offense under the racketeering statute, has called into question the constitutionality of some portions of RICO when applied to obscenity because the remedies which are appropriate to other RICO criminal offenses are unconstitutionally overbroad in the obscenity area when applied to protected speech as opposed to unprotected obscenity.

Nevertheless, courts strive to save statutes which may be interpreted to be constitutional. *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985); *State ex rel. Kidwell v. U.S. Mktg., Inc.,* 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed,* 455 U.S. 1009, 102 S. Ct. 1649, 71 L.Ed.2d 878 (1982). Thus, in interpreting Arizona statutes dealing with obscenity this court has, when possible, given the questioned statute a constitutional construction. *Book-Cellar,* 139 Ariz. at 528, 679 P.2d at 551. Our duty is to uphold statutes, even if they are not artfully drawn. *Id.* By adding obscenity as a

predicate offense in § 13-2301, the legislature manifested an intent that where obscenity is connected to racketeering, it needs to be dealt with in the racketeering statutes, rather than solely through the obscenity statutes, A.R.S. §§ 13-3501, *et seq.,* or nuisance statutes, A.R.S. §§ 12-811, *et seq.* We therefore strive to interpret the questioned statutes to effect that intent, to the extent that is constitutionally permissible.

1. *Standing*

Initially, we must determine whether defendants have standing to challenge the constitutionality of RICO as applied to obscenity charges.

The state asserts that it will not attempt to seize items or close businesses before trial, but will only request orders necessary to maintain the status quo. Thus, it might be argued that defendants have no standing to contest what the state *might* do. Although the state in its original brief "submits it would be a waste of judicial economy to decide this case on the basis that the trial court's ruling was premature," and that "the state agrees that the trial court's ruling should be considered on appeal in its entirety," in its supplemental brief, the state argues that defendants cannot challenge the facial validity of the statute because defendants' activities are clearly obscene. We disagree.

First, even if the items for which defendants are prosecuted are clearly obscene, we must presume that the other activities of defendants are protected activity. The possible chilling effect of the RICO remedies on presumptively protected activities and the fact that defendants are being prosecuted and could be subject to any of the remedies set forth in § 13-2314 entitles them to contest the constitution-

ality of § 13-2314 and requires the court to do a facial analysis of the statute before prosecution proceeds. *Polykoff v. Collins,* 816 F.2d 1326 (9th Cir. 1987); *J-R Dist., Inc. v. Eikenberry,* 725 F.2d 482 (9th Cir. 1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). *See also State v. Tocco,* 1 CA-CR 7480, slip op. at 4 (Ariz. App. Dec. 2, 1986), review pending in CR-87-0032-PR (April 7, 1987); *Western Business Sys., Inc. v. Slaton,* 492 F. Supp. 513 (N.D. Ga. 1980). As stated in the dissent in *State v. Superior Court,* slip op. at 21: "The threat of unbridled and unhindered criminal prosecution is bound to have a chilling effect upon publishers, libraries, motion picture exhibitors and the like." Moreover, our consideration of § 13-2314 indicates grave constitutional problems which would plague RICO obscenity prosecutions and affect protected activities without judicial guidance as to what constitutional limits must be placed on such prosecutions.

2. *Vagueness*

Section 13-2312(B), under which defendants were charged, provides:

> A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering [i.e., obscenity].

Section 13-2312(C) makes that act a class 3 felony. We reject defendants' argument that illegally conducting an enterprise through obscenity is an unconstitutionally vague offense. The basic test for determining whether a statute is unconstitutionally vague is whether the offense is defined in terms that people of average intelligence can understand, since no one may be required, at the risk of his liberty, to speculate as to the meaning of a penal statute. *State v. Serrano,* 145 Ariz. 498, 702 P.2d 1343 (App. 1985).

In *Tocco,* the defendant argued that the crime of leading organized crime, as set forth in A.R.S. § 13-2308, was unconstitutionally vague. This court held that

> A commonsense reading of the statute demonstrates a legislative intent to punish only those individuals who cooperate with a combination of individuals or businesses with the intent to assist them in violating Arizona's felony statutes on a continuing basis. The statute does not reach any constitutionally protected conduct and its proscriptions are easily understood by persons of ordinary intelligence.

Slip op. at 9. The court concluded that the crime of leading organized crime was not unconstitutionally vague. Slip op. at 13.

In *Baines v. Superior Court,* 142 Ariz. 145, 688 P.2d 1037 (App. 1984), Division Two of this court stated that the essential elements of illegally conducting an enterprise are:

> (1) defendant was employed by or associated with the enterprise;
>
> (2) that he conducted or participated in the conduct of the affairs of the enterprise;
>
> (3) that he conducted or participated in the conduct of the affairs of the enterprise through racketeering (i.e., through the commission of at least one predicate offense).

142 Ariz. at 149, 688 P.2d at 1041. Here the predicate offense of obscenity is referable to the Arizona obscenity statutes, A.R.S. §§ 13-3501, *et seq.* The definition of racke-

teering requires that the crime be for financial gain and punishable by imprisonment for more than one year. A.R.S. § 13-2301(D)(4). Further, § 13-2312(C) requires a knowing violation. The scienter requirement increases the notice to defendant that his conduct is prohibited and prevents arbitrary and discriminatory enforcement. *Tocco,* slip op. at 13. Thus, we find that § 13-2312(B) is not void for vagueness.

In *Tocco,* this court distinguished Ohio's organized crime statute which was struck down in *State v. Young,* 62 Ohio St. 2d 370, 406 N.E.2d 499, *cert. denied,* 499 U.S. 905, 101 S. Ct. 281, 66 L. Ed. 2d 137 (1980). Defendants have extensively cited *Young* in support of their vagueness argument. The Arizona statutes do not suffer from the deficiency of the Ohio statute because they do not punish a person who pursues legal activities. *Tocco,* slip op. at 8. Section 13-2312(B) makes conduct through an enterprise illegal only if it is "through racketeering." Thus, a defendant is criminally liable in a RICO obscenity prosecution only if he has committed an underlying felony obscenity crime.

3. *RICO Applied in Obscenity Cases*

A more difficult question is presented by the application of the RICO remedies in criminal obscenity prosecutions. The only opinion directly considering the constitutionality of applying RICO remedies in obscenity

prosecutions is *4447 Corp. v. Goldsmith,* 479 N.E.2d 578 (Ind. App. 1985), *vacated,* 504 N.E.2d 559 (Ind. 1987).[2] While the Indiana Supreme Court vacated the intermediate appellate court's opinion in *4447 Corp.,* we discuss the court of appeals' decision because we find it more comprehensive and persuasive than the Indiana Supreme Court's reversal of that decision.

Indiana Code Ann. § 34-4-30.5-2 & -3 provides that after the trial court finds by a preponderance of the evidence that a RICO violation has occurred, it may: (1) order divestiture of a defendant's interest in the business; (2) prohibit defendant from future activities or investments; (3) order dissolution or reorganization of the enterprise; (4) suspend or revoke licenses, permits, or corporate charters; (5) order forfeiture of property; or (6) make any other order deemed appropriate. The trial court in *4447 Corp.* ordered the padlocking of a bookstore which had not yet opened, and later ordered that the prosecution could padlock three operating bookstores and seize their contents. The police proceeded to seize and cart away the entire contents of the three bookstores.

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[2]In *Western Business Sys., Inc. v. Slaton,* 492 F. Supp. 513, 514 (N.D. Ga. 1980), plaintiffs asked the trial court to enjoin possible prospective prosecutions using obscenity as a predicate offense for RICO violations. They argued that forfeiture of property acquired with racketeering proceeds acted as a prior restraint on presumptively protected materials. The court held that there was no first amendment problem because the defendants were not entitled to retain racketering proceds, nor were they entitled to property acquired by racketeering proceeds, even if that property consisted of books. The court ruled that denial of the injunction was proper because there was no irreparable harm or likelihood of success on the merits of plaintiffs' claim.

In *4447 Corp.*, the intermediate appellate court invalidated the statutes as applied to obscenity on these grounds: (1) as an impermissible prior restraint; (2) for failure to comply with procedural safeguards; and (3) for failure to employ means that are less restrictive of free expression for regulation of materials presumtively protected by the First Amendment. 479 N.E.2d at 585. That court, however, primarily relied on the theory that the statutes were facially invalid as applied to obscenity because they constituted impermissible prior restraints on protected speech and press. *Id.* A clearly impermissible prior restraint was found because the state had padlocked stores and seized books, magazines, films, and other store property, only a small part of which had been alleged to be obscene. *Id.* at 586. The court was especially concerned that the state's pre-conviction actions had effectively prevented the circulation of presumptively protected materials.

The court also was concerned with the potential post-conviction remedy of forfeiture of defendants' real and personal porperty, including their inventory. The forfeiture remedy extended to presumtively protected materials, and was thus overbroad and facially invalid as a prior restraint. The court rejected the argument that the forfeiture sanctions were not prior restraints, but were merely punishment for criminal offenses, and concluded that forfeiture of licenses or charters were impermissible prior restraints, and noted that the RICO statute:

> may indeed curb the availability of obscenity but cuts a broad swath into the realm of protected expression as well. The consequent overbreadth of these measures with their attendant chilling effect on the exercise of First Amendment rights renders the entire scheme

> constitutionally invalid. We therefore hold that the injunctive remedies of IC 34-4-30.5-2, and the seizure and forfeiture sanctions of IC 34-30.5-3.-4, constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

479 N.E. 2d at 592.

The Indiana Supreme Court vacated the court of appeals' decision and held that the Indiana RICO statutes as they pertain to the predicate offense of obscenity do not violate the first and fourteenth amendments to the United States Constitution. The court decided that the RICO remedies were instituted in an attempt to compel the forfeiture of the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials.

We believe the court of appeals' decision and the dissent in the Indiana Supreme Court are better reasoned than the majority opinion from the supreme court. The dissenter stated his "agreement with the thoughtful and thorough opinion" of the court of appeals. Nevertheless, we disagree with the all-or-nothing results of both opinions, invalidating the entire statute or validating it in its entirety, as will be shown below. In interpreting Arizona statutes dealing with obscenity, this court has, when possible, given the questioned statute a constitutional construction. *Book-Cellar.*

4. *Pre-Judgment Remedies*

With the Indiana courts' opinions in mind, we examine the Arizona statutes. A.R.S. § 13-2313 provides that during the pendency of a RICO criminal proceeding pur-

suant to § 13-2312 the superior court may issue an order pursuant to § 13-2314(B)-(C) which provides:

> B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders.
>
> C. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the enforcement of constructive trusts, in connection with any property or other interest subject to damages, forfeiture or other remedies or restraints pursuant to this section as the court deems proper.

The state argues that the statutory pre-conviction remedies "do not provide for penalties prior to conviction, but rather only permit a court to preserve the status quo during the pendency of the proceedings." Defendants urge that the statutory scheme for pre-conviction remedies is unconstitutional because it restricts constitutionally protected activities and materials.

Section 13-2314(B) merely gives the court jurisdiction to prevent, restrain, or remedy racketeering by issuing appropriate orders, after consideration for the rights of all innocent persons affected by such violation and after a hearing or trial. We find no problem with this very general provision. Injunctions or restraining orders must comply with rule 65(h), Arizona Rules of Civil Procedure. *Book-Cellar.* Moreover, all orders under § 13-2314(B) would be subject to the limitations stated hereinafter.

Next, we consider the statutory pre-conviction remedies set forth in § 13-2314(C). That section sets forth permissible orders, including, but not limited to, restraining orders or prohibitions, including the acceptance of performance bonds for property subject to damages or forfeiture. The state argues that the purpose of § 13-2314(B) is merely to preserve the status quo. One primary and legitimate purpose of a predetermination order would be to ensure that a copy of an allegedly obscene book or movie is available as evidence. *Heller v. New York,* 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973); *City of Phoenix v. Ellwest Stereo Theater,* 21 Ariz. App. 611, 522 P.2d 567 (1974). Also, the court could take measures to ensure that a defendant would not conceal or dispose of the profits made from the sale of obscene items which would properly be subject to post-conviction seizure. While the court could restrain a defendant from moving inventory in its entirety, it could not interfere with continued exhibitions or sales. *Book-Cellar.* Any order requiring action such as forfeiting any property of the business, forfeiting a defendant's interest therein, or closing the business, prior to determination of liability, would be an impermissible prior restraint. Moreover, a preliminary order may not do what a post-conviction order may not do, as we shall discuss. Given these limitations, § 13-2314(C) is constitutional.

5. *Post-Judgment Remedies*

We turn now to the post-conviction remedies listed under § 13-2314(D), which states:

> D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, civil and criminal, including reasonable attorney fees, to be paid to the general fund of the state or county which brings the action.

6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:

(a) Any property or other interest acquired or maintained by a person in violation of § 13-2312.

(b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.

(c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection

D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate commission of the offense.

7. Payment to the general fund of the state or county as appropriate of an amount equal to the gain that was acquired or maintained through an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 or that any person is liable for under this section.

The state argues that any order pursuant to § 13-2314(D) is permissible because the defendants have been found guilty of the crime of obscenity and may be punished accordingly.

Subsections (D)(1), (2) and (3) are virtually identical to the Indiana statutory provisions held valid by the Indiana Supreme Court in *4447 Corp.* We agree with the reasoning of the Indiana Court of Appeals in *4447 Corp.*, 479 N.E.2d 578 (Ind. App. 1985), and with the dissent in *4447 Corp.*, 504 N.E.2d 559 (Ind. 1987), that these sanctions act as a prior restraint upon the sale of privileged matter, and that the effect of the restraint is to close bookstores and theatres. The sanctions restrict future, presumptively protected speech, rather than punishing the distribution of unprotected speech in the past. 479 N.E.2d at 591 (Ind. App.). To cite an example posed by defendants, under subsection (D)(1), the owners of bookstores which are not known as "adult" or sexually-oriented bookstores could be ordered to divest themselves of any interest in their stores if one store sold a magazine which is adjudged obscene. *See Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). Alternatively, under sub-

section (D)(3), the court could dissolve or reorganize the business. Without question, such action would constitute an impermissible prior restraint on protected activities.

Subsection (D)(4) is not applicable to this criminal action because there is no injured person. It apparently creates a private cause of action or right to restitution with treble damages for persons injured through obscenity. *State v. Henderson,* 149 Ariz. 254, 717 P.2d 933 (App. 1986). An award thereunder would not appear to constitute an impermissible prior restraint, any more than would a fine imposed on the defendant, a remedy which has been held not to constitute a prior restraint in *Polykoff v. Collins,* 596 F. Supp. 584 (D. Ariz. 1984), *aff'd,* 816 F.2d 1326 (9th Cir. 1987).

Similarly, subsection (D)(5), allowing a state or county general fund to be reimbursed for the cost of prosecuting a defendant, is not facially invalid because it does not single out protected interests, but rather applies in all RICO criminal actions and is in the nature of a fine. *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Rev.,* 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); *Polykoff.* Selling obscene matter is a crime, and the defendants can reasonably be required to reimburse the state or county for costs of prosecution.

The remedy in subsection (D)(6)—forfeiture of interests or proceeds—is proper to the extent that the obscene materials themselves, or proceeds from materials determined to be obscene, may be seized. *State v. A Motion Picture Entled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *United States v. Zang,* 703 F.2d 1186 (10th Cir. 1982). Also, as held in *Western Business Systems,* items

of the enterprise could be forfeited if they were gains from other racketeering activity. Racketeering proceeds cannot be laundered merely by being invested in bookstores. *4447 Corp.,* 504 N.E.2d 559 (Ind. 1987).

On the other hand, profits from the sales of protected materials—i.e., items not adjudged obscene—could not be seized. *J-R Distributors,* 725 F.2d at 494, *rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). Also, an order could not forbid the sale of items not yet determined to be obscene. *Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159 (5th Cir. 1978), *aff'd,* 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980). Moreover, the court could not order the seizure of bookshelves, cash registers, or similar items. *Book-Cellar,* 139 Ariz. at 533, 679 P.2d at 556.

Subsection (D)(7), allowing payment to a general fund of an amount equal to the "gain" acquired through the obscenity offense, is constitutional for the reasons just stated. The provisions for forfeiture under A.R.S. § 13-2314(F) are similarly limited as stated above. We note that § 13-2314(F)(3) is unconstitutional to any extent that it purports to allow seizure of property used to facilitate an offense where that property is not itself contraband, or traceable to racketeering proceeds. *United States v. Zang; Book-Cellar.*

The last question facing us is whether, having found some of the RICO remedies unconstitutional as applied to obscenity proceedings, we must declare the entire RICO scheme unconstitutional if applied to obscenity prosecutions. Defendants argue that to leave obscenity as a pred-

icate offense without leaving all of the RICO remedies intact frustrates legislative intent. They argue that the only effect of the partial validation is to elevate a class 6 felony under § 13-3502[3] to a class 3 felony under § 13-2312(C). They submit that the eviscerated version of the statute as applied to obscenity would add nothing to the prosecutorial tools now offered by Arizona obscenity statutes and the provisions of the criminal code. The trial court adopted this reasoning. We disagree.

First, we have not found all the § 13-2314 remedies unconstitutional as applied to obscenity cases. The legislature desired to reach obscenity through the RICO statutes to the extent constitutionally allowed. Where an obscenity statute is in part constitutional and in part unconstitutional, if the parts may stand independently of one another, that which is constitutional may stand, while that which is unconstitutional will be rejected. *Spokane Arcade.*

Second, the legislature, by making obscenity a predicate offense for RICO, and thus punishable as a class 3 felony under § 13-2312, has created a different crime than that set forth in § 13-3502. As noted herein, there are several elements to the crime of illegally conducting an enterprise through obscenity. Commission of the obscenity offense itself is only one element of that crime. Racketeering organizations can operate through the sale of obscenity just as they operate through any other illegal activity proscribed by § 13-2301. The crime of obscenity may be punished because obscenity itself is not protected by

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[3]A.R.S. § 13-3502 has recently been amended so that a violation is a class 5 felony. Laws 1986, ch. 411, § 2.

the first amendment. Correspondingly, conducting an illegal enterprise dealing in obscenity is punishable as a greater offense than the lesser crime of obscenity, just as the RICO statutes make many other crimes more serious when effected through racketeering.

6. *Conclusion*

In conclusion, we have construed the RICO statutes as they relate to a criminal prosecution involving obscenity, such that they pass constitutional muster and do not have a chilling effect on protected rights. The state's remedies against obscenity under RICO are more limited than the state's remedies against other forms of racketeering activity. These limits are required by the federal and state constitutional rights regarding freedom of speech and press. The state can no more expect to reach protected interests by means of the RICO statutes than it could by means of moral nuisance or obscenity statutes. *Book-Cellar; City of Phoenix v. Fine,* 4 Ariz. App. 303, 420 P.2d 26 (1966). As stated in the dissent in *State ex rel. Collins v. Superior Court* [*Scott*]: "Abhorrence of obscenity does not outweigh our duty to uphold the constitutional rights of free speech and free press." Slip op. at 21.

Since we conclude that the trial court erred in declaring that obscenity could not be used as a predicate offense for RICO prosecutions, we vacate the trial court's order granting the motion to dismiss Count I of the in-

dictment and remand for further proceedings consistent with this opinion.

/s/ Robert J. Corcoran
Judge

CONCURRING:

/s/ William E. Eubank
Judge

/s/ Donald F. Froeb
Judge